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BANK OF AMERICA, N.A.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

BANK OF AMERICA, N.A., a national banking association,

Petitioner,

VS.

MICHELETTI FAMILY PARTNERSHIP,
a California Limited Partnership, ARTHUR
MICHELETTI, an individual, and JANICE
MICHELETTI, an individual.

Respondents.

CASE NO. CV 08-2902 JSW

**BANK OF AMERICA'S
ADMINISTRATIVE MOTION TO
CONSIDER WHETHER CASES
SHOULD BE RELATED;
DECLARATION OF RICHARD C.
DARWIN
[LOCAL RULE 3-12]**

Pursuant to Civil Local Rule 3-12, Bank of America, N.A., ("Bank of America") hereby moves for an order deeming the case of *Micheletti v. Bank of America, N.A. and Larry Johnston*, Case No. CV 08-3557 BZ, to be related to the instant action, *Bank of America, N.A. v. Micheletti Family Partnership, Arthur Micheletti and Janice Micheletti*, Case No. CV 08-2902 JSW. This motion is made on the grounds that (i) the two actions concern substantially the same parties, transactions and events, and (ii) there will be an unduly burdensome duplication of labor and expense, and the possibility of conflicting results, if the cases are conducted before different judges, as explained in detail below.

On or about June 11, 2008, Bank of America filed a petition to compel arbitration in the above-captioned action (the “Federal Petition”). A true and correct copy of the Federal Petition is attached hereto as Exhibit A.

1 attached as Exhibit A to the Declaration of Richard C. Darwin. Arthur Micheletti, Janice
 2 Micheletti, and the Micheletti Family Partnership were all hand served with a summons and the
 3 Federal Petition on June 13, 2008. In the Federal Petition, Bank of America alleged that disputes
 4 have arisen between itself and Arthur Micheletti, Janice Micheletti, and the Micheletti Family
 5 Partnership (“Partnership”) relating to the terms of a Lease Agreement for premises located in
 6 San Mateo, California (the “Lease Agreement”), and relating to allegations by the Micheletti that
 7 Bank of America breached a fiduciary duty in its dual role as the trustee of a trust that owned the
 8 subject premises, and as the tenant in the Lease Agreement. On the basis of those disputes, and
 9 the existence of an arbitration provision in the Lease Agreement, Bank of America seeks an order
 10 from this federal district court compelling the parties to arbitrate the aforementioned disputes.

11 On or about July 16, 2008, in an effort to avoid federal jurisdiction, plaintiff Art
 12 Micheletti (“Micheletti”) filed an action in the Superior Court of the State of California in and for
 13 the County of San Francisco, entitled “*Art Micheletti, an individual, Plaintiff v. Bank of America,
 N.A., a national banking association, Larry Johnston, an individual, and Does 1-10, Defendants,*”
 14 Case No. CGC 08-477590 (the “State Action”) to adjudicate in state court the same claims raised
 15 in the Federal Petition. A true and correct copy of the complaint in the State Action is attached as
 16 Exhibit B to the Declaration of Richard C. Darwin.
 17

18 On July 24, 2008, Bank of America removed the State Action to this court on the basis of
 19 diversity jurisdiction, and it now bears the caption *Micheletti v. Bank of America, N.A. and Larry
 Johnston*, Case No. CV 08-3557 BZ. A true and correct copy of the Notice of Removal is
 20 attached as Exhibit C to the Declaration of Richard C. Darwin.
 21

22 Because the claims and issues in the two actions are virtually identical, address the same
 23 transactions and subject matter, and involve the same parties, the two actions should be deemed
 24 related pursuant to the standards set forth in Local Rule 3-12(a).
 25

26 In an email to opposing counsel dated July 25, 2008, Bank of America sought a stipulation
 27 that the Federal Petition and the removed State Action were related for purposes of Local Rule 3-
 28 12. *See Exhibit D to Declaration of Richard C. Darwin.* Bank of America never received a
 response to that request.
 BN 2120246v1

1 DATED: July 28, 2008

Respectfully submitted,

2 BUCHALTER NEMER
A Professional Corporation

3 By: _____

4 RICHARD C. DARWIN
5 Attorneys for Petitioner
6 BANK OF AMERICA, N.A.

7

8

DECLARATION OF RICHARD C. DARWIN

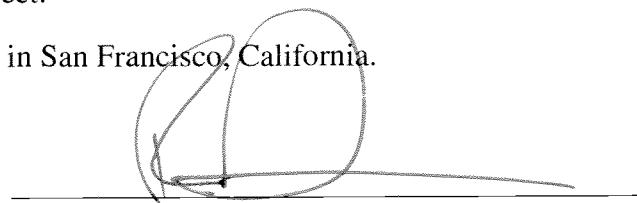
9 I, Richard C. Darwin, do hereby declare and say:

10 1. I am an attorney licensed to practice before this district court and all of the courts
11 of the State of California, and am a shareholder in the law firm of Buchalter Nemer, counsel of
12 record for Bank of America, N.A. in this action. I make this declaration on my own personal
13 knowledge. If called as a witness, I could and would competently testify to the matters contained
14 herein.15 2. Attached as Exhibit A to this declaration is a true and correct copy of the Petition
16 to Compel Arbitration filed by Bank of America in this action on June 11, 2008. This Petition
17 was served on Respondents by hand on June 13, 2008.18 3. Attached as Exhibit B to this declaration is a true and correct copy of the
19 complaint filed by Art Micheletti in San Francisco Superior Court on July 16, 2008 (the "State
20 Action").21 4. On July 24, 2008, Bank of America removed the State Action to this court on the
22 basis of diversity jurisdiction, and it now bears the caption *Micheletti v. Bank of America, N.A.*
23 and *Larry Johnston*, Case No. CV 08-3557 BZ. A true and correct copy of the Notice of
24 Removal is attached hereto as Exhibit C.25 5. On Friday, July 25, 2008, I sent an e-mail to James Wagstaffe and Adrian Sawyer,
26 counsel of record for Art Micheletti, Janice Micheletti, and the Micheletti Family Partnership, in
27 which I requested a stipulation that the Federal Petition and the removed State Action were
28 BN 2120246v1

1 related for purposes of Local Rule 3-12. A true and correct copy of that email is attached to this
2 declaration as Exhibit D. I have not received a response to that request.

3 I declare under penalty of perjury under the laws of the United States and the State of
4 California that the foregoing is true and correct.

5 Executed this 28th day of July, 2008, in San Francisco, California.

A handwritten signature of "Richard C. Darwin" is written over a horizontal line. The signature is cursive and includes a stylized initial 'R'.

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8 Richard C. Darwin
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Exhibit A

1 BUCHALTER NEMER
 2 A Professional Corporation
 3 JAMES B. WRIGHT (SBN: 63241)
 4 RICHARD C. DARWIN (SBN: 161245)
 5 333 Market Street, 25th Floor
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 Facsimile: (415) 227-0770
jwright@buchalter.com

6 Attorneys for Petitioner
 BANK OF AMERICA, N.A.

E-filing

8 **UNITED STATES DISTRICT COURT**
 9 **NORTHERN DISTRICT OF CALIFORNIA**

EMC

10
 11 BANK OF AMERICA, N.A., a national
 banking association,

12 Petitioner,

13 vs.

14 MICHELETTI FAMILY PARTNERSHIP, a
 15 California Limited Partnership, ARTHUR
 16 MICHELETTI, an individual, and JANICE
 MICHELETTI, an individual,

17 Respondents.

CV
 08 CASE NO.

2902

**BANK OF AMERICA'S PETITION
 TO COMPEL CONTRACTUAL
 ARBITRATION**

19 **INTRODUCTORY ALLEGATIONS**

20 1. Petitioner, Bank of America, N.A. (the "Bank") is a national banking association
 21 with its headquarters in Charlotte, North Carolina.

22 2. Respondent Arthur Micheletti is a resident of San Mateo County, California, and
 23 was a beneficiary of the trust created by Arturo Micheletti by substituted declaration of trust dated
 24 March 13, 1931 (the "Trust").

25 3. Respondent Janice Micheletti is a resident of San Mateo County, California.

26 4. Arthur Micheletti and Janice Micheletti (collectively, the "Michelettis"), are the
 27 general partners of the Micheletti Family Partnership (the "Partnership"), a California limited

1 partnership. Upon information and belief, the Bank alleges that the Partnership is organized
2 under and pursuant to the laws of the State of California, with its principal place of business in
3 San Mateo County, California.

4 5. On or about July 18, 1977, Bank of America N.T. & S.A., as the tenant, entered
5 into a lease agreement with the Trust, as landlord, for premises located in San Mateo, California
6 (the "Lease Agreement"). A true and correct copy of the Lease Agreement, and amendments
7 thereto, is attached hereto as Exhibit A.

8 6. The Bank is the successor in interest to Bank of America N.T. & S.A. The
9 Partnership is the successor in interest to the Trust.

JURISDICTION AND VENUE

11 7. This Petition involves a dispute between citizens of different states, as the Bank is
12 a national banking association with its principal place of business in Charlotte, North Carolina,
13 the Respondents are either organized in, or citizens of, the State of California, and the amount in
14 controversy exceeds \$75,000, exclusive of interest and costs. Diversity jurisdiction is therefore
15 proper under 28 U.S.C. Section 1332.

16 8. Venue is proper in this district because the Lease Agreement which is the subject
17 of this lawsuit was entered into, and was to be performed, in San Mateo County, California.

INTRADISTRICT ASSIGNMENT

19 9. Pursuant to Local Rule 3-2(d), this Petition should be assigned to the San
20 Francisco or Oakland Division, as a substantial part of the events giving rise to the claims
21 addressed in this Petition occurred in San Mateo County, California.

OPERATIVE ALLEGATIONS

23 10. The premises that are the subject of the Lease Agreement are located at 251, 253
24 255 and 257 South B Street, and 240 and 250 Main Street, in San Mateo, California (the
25 “Premises”).

26 11. Disputes have arisen between the Bank, on the one hand, and the Partnership and
27 Micheletti on the other, regarding the Lease Agreement. Specifically, the Lease Agreement
28 provides: (i) that the tenant may construct new improvements and interior alterations and

1 remodeling that the tenant deems necessary to the conduct of its business, and (ii) that upon the
 2 expiration of the lease term, the tenant shall construct a demising wall on the Premises "to
 3 separate any improvements constructed at Tenant's expense, on the said premises from any
 4 improvements constructed and alterations made and performed on the adjacent Tenant-owned
 5 property." Lease Agreement, Article 33.

6 12. Notwithstanding the clear language of the Lease Agreement, and the Bank's
 7 express willingness to meet its obligations under the Lease terms, the Partnership has demanded,
 8 and continues to demand that, in addition to the construction of the demising wall, the Bank
 9 remodel the Premises and return them to the exact condition they were in at the time the Lease
 10 Agreement was signed in July of 1977. In addition, the Partnership is demanding that the Bank
 11 perform other repairs at the Premises and asserting damage claims well in excess of \$1 million.

12 13. Arthur Micheletti, as the beneficiary of the Trust, has further alleged and claimed
 13 that the Lease Agreement is invalid and should be revoked because the Bank's predecessor-in-
 14 interest allegedly breached its fiduciary duties as the trustee of the Trust by signing the Lease
 15 Agreement both as trustee/landlord and as tenant.

16 14. The Lease Agreement contains a broad arbitration clause which requires the
 17 arbitration of any and all disputes relating to the Lease Agreement. Specifically, pursuant to
 18 Article 20 of the Lease Agreement, "any question, dispute, controversy or misunderstanding
 19 arising under any provision of this lease shall be settled by arbitration. The party asking for
 20 arbitration shall request arbitration through the American Arbitration Association and the decision
 21 of that association shall be binding unto the parties hereto."

22 15. The disputes alleged herein affect interstate commerce, as they are between
 23 citizens of different states.

24 16. Pursuant to the express agreement of the parties to this Action or their
 25 predecessors in interest which binds them, the only proper forum for the resolution of the claims
 26 asserted by the Partnership and Micheletti, including but not limited to the questions of whether
 27 those claims are barred by the statute of limitations, laches, estoppel, or any other legal or
 28 equitable doctrine, is arbitration before the American Arbitration Association. Nonetheless,
 BN 2002013v3

1 despite the unambiguous arbitration clause in the Lease Agreement, the Bank's express intent to
 2 arbitrate the disputes as outlined in this petition, and the Bank's request that Respondents arbitrate
 3 these disputes, Respondents have thus far declined to arbitrate those claims, and have
 4 unambiguously manifested an intention not to arbitrate those disputes.

5 **PRAYER**

6 **NOW, THEREFORE**, Bank of America requests the following relief:

- 7 1. For an Order compelling Respondents, and each of them, to arbitrate the disputes
 8 identified hereinabove pursuant to the terms of the Agreement;
- 9 2. For an Order staying these proceedings pending arbitration of the disputes between
 10 the parties pursuant to the terms of the Lease and providing that the Court will retain jurisdiction
 11 of this matter pending arbitration;
- 12 3. For the Bank's attorneys fees and costs of suit; and
- 13 4. For such other and further relief as the Court may deem just and proper.

14
 15 DATED: June 10, 2008

BUCHALTER NEMER
 A Professional Corporation

16
 17 By:  
 18 JAMES B. WRIGHT
 Attorneys for Petitioner
 19 BANK OF AMERICA, N.A.
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Exhibit A

GROUP
LEAVE

VIA
H/S

I N D E X

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GROUND LEASE

THIS AGREEMENT, made and entered into this 18
day of July, 1977, by and between BANK OF
AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national
banking association, hereinafter called "Tenant", and
~~Bank of America National Trust and Savings Association, as Trustee
of the Trust created by Arturo Micheletti by Substituted Declaration of
Trust dated March 13, 1931,~~
hereinafter called "Landlord",

W I T N E S S E T H:

ARTICLE 1

TERM

Landlord hereby leases to Tenant and Tenant hires
from Landlord those certain premises situated in the City of
San Mateo, County of San Mateo, State
of California, more particularly described on Exhibit "A",
attached hereto, together with (a) all buildings and improve-
ments at any time during the term located thereon, whether
constructed by Landlord or Tenant, (b) all building equipment
of every kind and nature on or in said building and improve-
ments, and (c) all and singular the appurtenances, rights and
privileges in anywise pertaining thereto, herein called "the
premises", for a term of three hundred and sixty
(360) calendar months (plus the partial month, if any, im-
mediately following the commencement of the leased term), com-
mencing as provided in Article 30 and expiring on the last day
of the three hundred and sixtieth (360th)

full calendar month (the initial portion of the lease term) thereafter, plus the rental for the partial month, if any, payable in advance on the first day of each month in installments as provided in Article 17 hereof.

ARTICLE 2

HOLDING OVER

Should Tenant hold over the term hereby granted with the consent of Landlord, the term of this lease shall be deemed to be and shall be extended at the monthly rent then in effect, and otherwise upon the covenants and conditions in this lease contained, until either party serves upon the other thirty (30) days' written notice reciting therein the effective date of cancellation, and upon said date this lease as so extended shall terminate.

ARTICLE 3

RIGHT OF INSPECTION

Landlord and the agents and employees of Landlord shall have the right to enter upon said premises at all reasonable times to inspect the same to see that no damage has been or is done and to protect any and all rights of Landlord and to post such reasonable notices as Landlord may desire to protect the rights of Landlord.

ARTICLE 4

REMEDIES

Section 4.1. Default. This lease is made upon the

condition that if default be made in the payment of said rent and such default shall continue for more than ten (10) days after receipt of a written demand by Landlord to Tenant therefor, or if Tenant fails or neglects to perform any of Tenant's other obligations hereunder for a period of twenty (20) days after receipt of written demand by Landlord to Tenant for such performance (provided, however, if the default is of such a character as to require more than twenty (20) days, then if Tenant shall fail to use reasonable diligence in curing such default), or if Tenant shall abandon or vacate said premises, or if the estate hereby created shall be taken on execution, and such execution shall not be cancelled, satisfied or otherwise removed within thirty (30) days after notice by Landlord, or if Tenant shall be adjudicated bankrupt or insolvent according to law, or if any assignment of its property shall be made for the benefit of creditors, then and in any of said events Landlord or the legal representative of Landlord, without notice or demand, may lawfully declare said term ended, and re-enter said premises or any part thereof, either with or without process of law, and expel, remove and put out Tenant or any person or persons occupying said premises, and may remove all personal property therefrom, using such force as may be necessary to repossess and enjoy said premises as before this demise, without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant or condition and without liability to any person for damages sustained by reason of such removal. Upon

declaration by Landlord as aforesaid that the term herein provided has ended, no compensation, damage or allowance shall be made to Tenant for any buildings or additions thereto or improvements thereon and thereof directed or undertaken or performed at any time by said Tenant, and all right, title and interest of Tenant in and to said leased land, premises, buildings and improvements, whether at law or in equity, shall immediately cease and terminate, all with the same force and effect as if this lease had duly expired by efflux of the full period for which the demised premises are hereunder leased.

Section 4.2. Performance by Landlord. In the event that Tenant shall fail or neglect to do or perform any act or thing herein provided by it to be done or performed for a period of thirty (30) days after written notice from Landlord specifying the nature of the act or thing to be done or performed (excluding from said thirty (30) day period the period during which Tenant shall attempt with diligence and good faith to do or perform the act or thing which is the subject of the notice herein in this sentence provided), then Landlord may perform such act or thing for the account of Tenant and Landlord shall not be or be held liable or in any way responsible for any loss, inconvenience, annoyance or damage resulting to Tenant on account thereof, and Tenant shall repay to Landlord upon demand the entire cost and expense thereof, including compensation to the agents and servants of Landlord. Landlord shall have a right of entry upon the leased

premises through his agents, their representatives, or a receiver who may be appointed by a court for such purposes. Such entry shall not be deemed to, and shall not constitute an eviction, actual or constructive, of Tenant from the demised premises or any part thereof. Any act or thing done by Landlord pursuant to the provisions of this section shall not be or be construed as a waiver of any such default by Tenant, or as a waiver of any covenant, term or condition herein contained or of the performance thereof. All amounts payable by Tenant to Landlord under any of the provisions of this lease, if not paid when the same become due as in this lease provided, shall bear interest from the date the same became due until paid at the rate of eight percent (8 %) per annum, compounded annually.

Section 4.3. Attorneys' Fees. If any action at law or in equity shall be brought to recover any rent under this lease, or for or on account of any breach of or to enforce or interpret any of the covenants, terms or conditions of this lease, or for the recovery of the possession of the leased premises, prevailing party shall be entitled to recover from the other party as part of prevailing party's costs reasonable attorneys' fees, the amounts of which shall be fixed by the court and shall be made a part of any judgment rendered.

Section 4.4. Waiver. One or more waivers of any covenant or condition by Landlord shall not be construed as a waiver of a subsequent breach of the same or any other covenant or condition, and the consent of approval by Landlord

to or of any act by Tenant requiring Landlord's consent or approval shall not be deemed to waive or render unnecessary Landlord's consent or approval to or of any subsequent similar act by Tenant.

ARTICLE 5

USE

Tenant agrees that it will not use the premises for or carry on or permit upon said premises any offensive, noisy or dangerous trade, business, manufacture or occupation or any nuisance or anything against public policy; that the premises shall not be used in whole or in part during the term of this lease for any purpose or use in violation of any of the laws, ordinances, regulations or rules of any public authority at any time applicable thereto.

ARTICLE 6

UTILITIES

Tenant agrees that it will pay for all the fuel, gas, oil, heat, electricity, water, power and sewerage which may be furnished to or used in or about said premises during the term of this lease; and that it will keep the premises free and clear of any lien or encumbrance of any kind whatsoever created by Tenant's acts or omissions.

ARTICLE 7

CARE AND MAINTENANCE

Tenant shall keep and maintain, or cause to be

kept and maintained, all buildings, improvements and appurtenances, including, without limitation, sidewalks and driveways, which may at any time during the lease term be located upon the leased land in good condition and repair and in a clean, attractive and sanitary condition, reasonable wear and use, damage from casualties (except as otherwise provided in Articles 9 and 11) excepted.

ARTICLE 8

ASSIGNMENT and SUBLETTING

Section 8.1. Assignment. It is hereby covenanted and agreed by and between the parties hereto that Tenant may, subject to the conditions hereinafter set forth, assign its interest in and to this lease in the manner hereafter provided, upon condition that at the date of assignment Tenant shall not then be in default of any of the covenants and conditions herein contained to be kept, observed and performed by Tenant, and provided also that such assignment by Tenant shall be evidenced by an instrument in writing, duly executed and acknowledged by both Tenant and the assignee before a notary public or other officer authorized by law to take acknowledgments and duly recorded in the Recorder's Office of the County of San Mateo, wherein and whereby such assignee shall expressly accept and assume all of the terms, covenants and conditions in this lease contained to be kept, observed and performed by Tenant, and shall become bound to comply therewith, and an executed original of such instrument of assignment

shall be delivered to Landlord wherein shall also appear the specific place of business or residence of the said assignee. The Tenant further covenants and agrees that it will not make any assignment of this lease, except in the manner and upon the conditions set forth herein, and it is agreed by and between the parties hereto that any assignment by Tenant of its interest in and to this lease without complying with the covenants and conditions aforesaid shall be null and void.

Tenant shall remain liable hereunder for the full and complete performance of all the terms, covenants and conditions hereof, notwithstanding any such assignment of the within lease and the assumption of liability of any assignee.

Each assignment that may be made shall specifically provide that Landlord may modify or alter this lease or the terms thereof in any particular and extend any indulgence he may see fit to such assignee, without in anywise relieving the Tenant of any obligation to respond to Landlord for any breach of covenants or conditions of this lease as so amended, or altered; provided, further, however, that no amendment or alteration of this lease shall enlarge or extend the liability of Tenant.

Section 8.2. Subletting. It is further mutually agreed between the parties hereto that Tenant may sublet all or any part of any building and/or improvements upon the land hereunder demised for any period or periods within the term hereby demised, provided that the lease or leases under which

subleasing shall be made are subject to all of the covenants, agreements and conditions of this lease, and provided further, that upon the termination of this lease such subleases shall ipso facto be terminated, provided also, that the receipt by Landlord from any subtenant or subtenants of Tenant of any rent due to Tenant be received and applied by Landlord toward the payment of the rent hereby reserved shall not be taken and construed as a release of Tenant from any of its liabilities undertaking the covenants and agreements hereunder, except to the extend of the moneys so received by said Landlord.

Any sublease by Tenant shall be evidenced by an instrument in writing, a short form of which, suitable for recording, shall be duly executed and acknowledged by both Tenant and the sublessee before a notary public or other officer authorized by law to take acknowledgments and duly recorded in the Recorder's Office of the County of San Mateo. Any such sublease shall provide that such sublessee shall expressly agree to take said sublease subject to all of the terms, covenants and conditions in this lease contained to be kept, observed and performed by said sublessee. A conformed copy of such instrument of sublease and the short form thereof shall be delivered to Landlord, in which sublease shall also appear the specific place of business or residence of said sublessee.

ARTICLE 9

DESTRUCTION

Section 9.1. Destruction-Damage - Fire Insurance.

If any buildings or improvements on the premises are partially or totally destroyed or damaged by a risk against which insurance with a licensed insurance company under a normal fire insurance policy with an extended coverage endorsement attached, in an amount of not less than eighty percent (80%) of its full insurable value, excluding foundations and excavations would cover, except to the extent hereinafter provided, Tenant shall restore, or cause to be restored, such damage or destruction; provided, however, Tenant may, at its sole option, remove such damaged or destroyed building or buildings and replace it or them with another building or buildings as in its sole option may elect; provided, said building is comparable in value to that which is being replaced. Any insurance proceeds available, whether from Tenant's self-insurance plan or otherwise, shall be the property of Tenant, and Landlord shall have no interest therein.

Section 9.2. Destruction-Damage - Other Causes.

In the event the building or buildings on the demised premises shall be partially or totally damaged or destroyed from any cause whatsoever, this lease shall be unaffected and the rights or obligations of Tenant shall not be affected thereby (except as otherwise provided in Section 9.3 hereof), except that Landlord or Tenant may, at the option of either party, elect to terminate this lease by notice to the other within ninety (90) days after the occurrence of any such damage or destruction if Tenant is not obligated to or does not elect to repair such damage or place another building or buildings

on the demised premises pursuant to the provisions of Section 9.1 hereof.

Section 9.3. Destruction-Damage - Within Last Five Years of Term. In the event the building and/or improvements on the premises are damaged or destroyed (i) within the last five (5) years of the then existing term of this lease, or any extended term thereof, and (ii) to such an extent that restoration in the original form or construction of new improvements is not economically feasible in the opinion of Tenant, this lease may be terminated at Tenant's option by notice served upon Landlord within ninety (90) days following any such damage or destruction, and such damage or destruction is covered under Tenant's self-insurance plan, Tenant shall pay to Landlord the amount, if any, which an insurance company would have paid as a result of said loss, damage or destruction if Tenant had secured a fire insurance policy with an extended risk coverage endorsement^{special form} attached insuring the building and improvements against the perils covered by said policy and endorsement to the extent of not less than eighty percent (80%) of the full fair insurable value thereof.



ARTICLE 10

REMOVAL OF FIXTURES

It is agreed that at the expiration or sooner termination of this lease term, or of any renewal or extension thereof, Tenant may remove all, any or any part of the fixtures, vault doors, safe-deposit boxes, walk-up windows, drive-up windows, and all other trade fixtures placed in said premises by Tenant

under the terms hereof or under the terms of any former tenancy, and for the purpose of this section all such enumerated items and other trade fixtures placed in said premises by Tenant shall not be deemed alterations, additions or improvements to the premises, but it is agreed that, upon the expiration or sooner termination of the lease term, or any extension or renewal thereof, Tenant shall not be required to remove such fixtures or any part thereof placed in said premises by Tenant unless it elects to do so. In the event Tenant shall remove any such fixtures as herein provided, Tenant shall repair any damage to the premises occasioned thereby.

ARTICLE 11

CONDEMNATION

Section 11.1. Entire or Substantial Taking. If title to all of the premises or so much thereof be taken for any public or quasi-public use under any statute or by right of eminent domain, or by private purchase in lieu thereof, so that a reasonable amount of reconstruction of the premises and any building or improvements thereon will not result in the premises and the building or improvements thereon being a practical improvement and reasonably suitable for Tenant's continued occupancy for the uses and purposes for which the premises are leased, this lease shall terminate as of the date that possession of said premises, or any part thereof, be taken and rent and other charges shall be adjusted as of such date.

Section 11.2. Partial Taking. If any part of the premises shall be so taken, including any portion of any building or improvements thereon, and the remaining part thereof (after reconstruction of the then existing building in which the premises are located) is reasonably suitable for Tenant's continued occupancy for the purposes and uses for which the premises are leased, this lease shall, as to the part so taken, terminate as of the date that possession of such part of said premises be so taken and the rent shall be reduced in the same proportion that the land area taken bears to the original land area demised, and Tenant shall, at its own cost and expense, make all necessary repairs or alterations to the building and improvements situated thereon so as to constitute the portion of the building and improvements not taken as a complete architectural unit.

Section 11.3. Disposition of Proceeds. There shall be a joint award or settlement made to and with Landlord and Tenant for such part of the premises so taken, and any sums legally recoverable are to be paid therefor, including damage to the leasehold interest, if any, the fee and the remainder. The proceeds of such joint award, settlement or compensation (or any separate awards, settlements or compensation made in lieu thereof), which sums so legally recoverable are paid, shall be distributed as follows: (i) the amount required for the restoration or rehabilitation of any building or improvements (in the event of a partial taking and the continuance of this lease as to the premises not so taken) shall be paid to Tenant to be used solely for that

purpose, (ii) such portion of said proceeds as shall represent Tenant's depreciated cost of the improvements or building made or erected on the premises by Tenant shall be paid to Tenant. The term "depreciated cost" within the meaning of this section means the amount which is the then Tenant's adjusted cost basis of said building and improvements should Tenant depreciate said building and improvements over the then remaining term of this lease including the option periods; provided, that said residue shall be an amount not less than the value of the land leased hereunder if taken in its entirety by right of eminent domain, or in the event that part of said leased land is taken, then the value of such part plus the damages, if any, caused to the remaining portion shall be the amount included in said residue; it being understood that said value and said damages shall be determined and ascertained as of the date of said taking by right of eminent domain and shall be determined and fixed in said eminent domain proceedings and shall in no event include the value of any improvements on said land leased; (iii) the residue of said proceeds shall belong to and be paid over to Landlord on his proper share of said award, settlement or compensation.

Section 11.4. Further Assurance. Each party agrees to execute and deliver to the other all instructions that may be required to effectuate the provisions hereof.

ARTICLE 12

INSURANCE

Tenant agrees that it will at all times and at its

own expense during the term or extended term of this lease maintain in force a policy or policies of comprehensive liability insurance, including property damage, written by one or more responsible insurance carriers which will insure Tenant and Landlord against liability for injury to persons and/or property and death of any person or persons occurring in or about the premises. Liability under such insurance shall not be less than TWO HUNDRED THOUSAND DOLLARS (\$200,000.00) for any one (1) person injured or killed and not less than FIVE HUNDRED THOUSAND DOLLARS (\$500,000.00) for any one (1) accident. The insurance provided for in this section may be a general policy or policies covering all of Tenant's properties.

ARTICLE 13

GOVERNMENTAL REGULATIONS

Tenant shall promptly observe and comply with all laws, orders, regulations, rules, ordinances and requirements of the federal, state, county and city governments and of all other governmental authorities, affecting the leased premises or appurtenances or any part thereof, and of all their departments, bureaus or officials, whether such laws, orders, regulations, rules or ordinances relate to alterations or requirements or repairs, either inside or outside, extraordinary or ordinary, to or in and about the leased premises, or any building thereon, or in any vaults, passageways, franchises or privileges appurtenant thereto or connected with the enjoyment thereof, or to changes or requirements incident to or as a result of any use or occupation thereof, or otherwise, and whether the same are in force at the commencement of the

lease term or may in the future be passed, enacted or directed, and Tenant shall pay all costs, expenses, claims, fines, penalties and damages that may in any manner arise out of or be imposed because of failure of Tenant to comply with the provisions of this section.

ARTICLE 14

QUIET ENJOYMENT

Landlord covenants that there are not now any restrictive covenants, zoning or other ordinances, regulations or easements which will prevent Tenant from conducting its usual business or any department thereof in the premises or which will prevent the construction, alteration or remodeling of the premises to meet the needs of Tenant; and that if any such restrictive covenant, zoning or other ordinance, regulation, or easement is hereafter enacted or found to exist prior to the time that such construction, alteration or remodeling is completed, then Tenant may, at its option, terminate this lease.

ARTICLE 15

TAXES

Tenant will pay before delinquency all taxes and assessments levied or assessed against any trade fixtures, equipment or personal property placed or kept by it upon the demised premises.

Tenant also agrees to pay before delinquency, as additional rent, all real property taxes and assessments

which are levied or assessed against the demised premises and/or the improvements theron during the term of this lease or any renewal thereof.

It is agreed benefit may be taken of the provisions of any statute or ordinance permitting such taxes and assessments to be paid over a period of time and Tenant shall be obligated to pay only the installments of such taxes and assessments which are attributable to the term of this lease. All real property taxes and assessments for the years in which this lease commences and terminates shall be apportioned between Landlord and Tenant on a daily basis.

If the demised premises are separately assessed, Tenant will furnish to Landlord upon request evidence of the payment prior to delinquency of said taxes and assessments herein agreed to be paid by Tenant.

If it shall so desire, Tenant may at any time contest the validity of any assessment, tax or levy. In this event, Landlord will offer no objection and at the request of Tenant, but without expense to Landlord, will cooperate with Tenant in such contest. Tenant hereby agrees to indemnify and save Landlord harmless against any and all loss, cost or expense of any kind in connection therewith.

Nothing herein contained shall be construed to require the Tenant to pay any franchise, estate, inheritance, succession, capital levy, or transfer tax of the Landlord growing out of or connected with this lease or the Landlord's rights in the demised premises or any income, excess profits or revenue tax, or any other tax, assessment, rate or charge

upon the rentals payable by the Tenant under this lease. If the Tenant shall be required by law to pay any such tax, assessment, rate or charge specified in this paragraph, the Tenant shall have the right to deduct the amount thereof from subsequent installments of rent due from the Tenant under the terms of this lease.

ARTICLE 16

OWNERSHIP OF IMPROVEMENTS

The parties hereto agree that irrespective of the fact that the property hereunder demised is improved, the rental hereunder reserved is a ground rental and, except as otherwise herein provided in Article 9, Landlord shall at all times be entitled to receive said rental in full, irrespective of the tearing down or demolition of, or any injury or damage to, or the destruction of any present and existing building and/or improvements or of any future building and/or improvements or the lapse of any time required for the reconstruction or replacement of any thereof.

Any building hereafter constructed upon the demised land in consonance with any of the provisions of this lease shall become the property of and be surrendered to Landlord upon expiration of the leased term; and Tenant shall have no obligation to remove any such improvements or building at the expiration of the lease term.

ARTICLE 17

RENT

Tenant shall pay Landlord monthly in advance on the

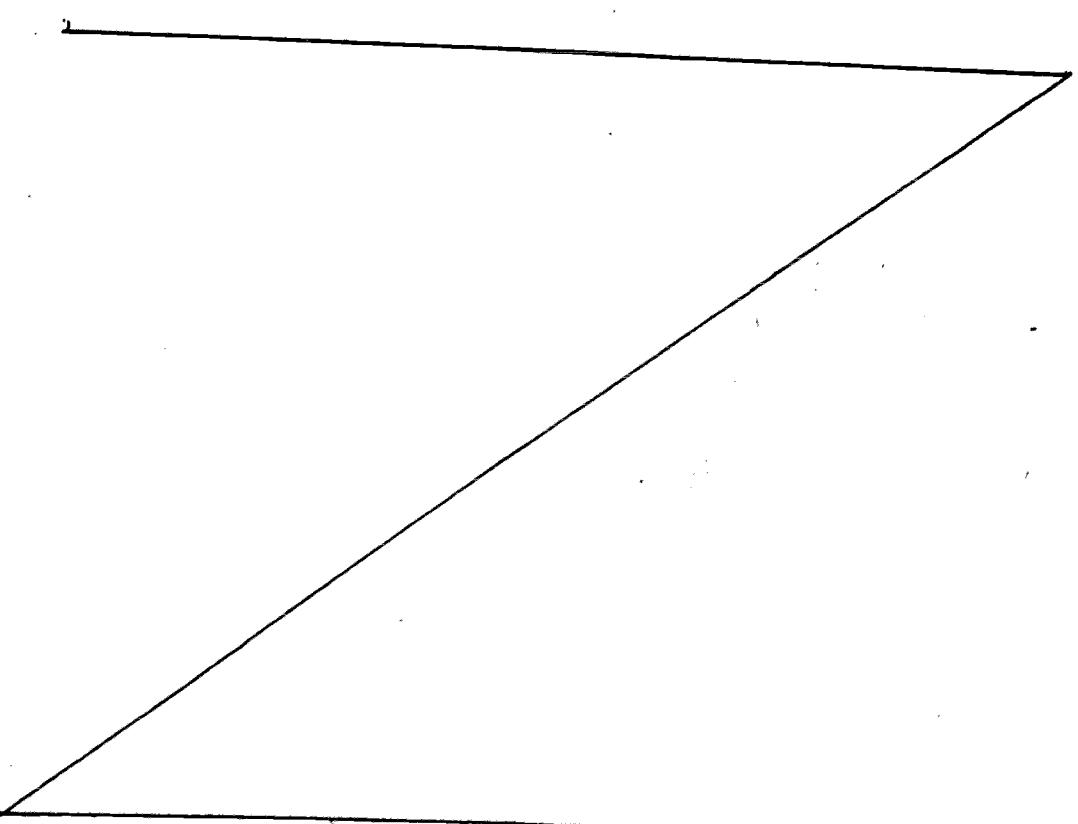
first day of each and every month Two Thousand and no/100
DOLLARS (\$ 2000.00) per month for each month of the first five (5) year
period of the initial lease term, rental for partial months being prorated.
Rent shall be adjusted at 5 year intervals thereafter as provided in Article
32 herein.

ARTICLE 18

OPTIONS TO EXTEND TERM

Tenant shall have the following options to extend the term of
this lease under the same terms, covenants and conditions hereof, except
as to rental. Landlord grants Tenant four (4) successive five (5) year
options to extend this agreement under the same terms and conditions
herein provided.

Each such option shall be exercised by Tenant giving to Landlord
a notice that it is exercising the same at least six (6) months prior to
the date upon which this lease, or as it may have been extended, would
terminate if such option were not exercised. The rent to be paid for
each such extended term or terms shall be adjusted as provided in Article
32 herein.



ARTICLE 19

NOTICES

All notices, statements, demands, requests, consents, approvals, authorizations, offers, agreements, appointments, designations, or refusals hereunder by either party to the other shall be in writing and shall either be personally served upon the other party or sent by United States registered mail, return receipt requested, postage prepaid. If sent by mail, the same shall be addressed to Landlord or Tenant, as the case may be, at the following addresses, or to such address as the parties hereto shall designate from time to time:

Landlord: Bank of America N. T. & S. A.
Trust Department
400 El Camino Real
P. O. Box 1991
San Mateo, CA 94402

Tenant: Bank of America N. T. & S. A.
c/o Continental Service Company
260 Fifth Street
San Francisco, California 94103.

ARTICLE 20

ARBITRATION

Any question, dispute, controversy or misunderstanding arising under any provision of this lease shall be settled by arbitration. The party asking for arbitration shall request arbitration through the American Arbitration Association and the decision of that association shall be binding unto the parties hereto. The expense of the arbitration shall be borne as the American Arbitration Association directs.

ARTICLE 21

HOLD HARMLESS

Tenant covenants and agrees that Landlord shall not at any time or to any extent whatsoever be liable, responsible, or in anywise accountable for any loss, injury, death or damage to persons or property which at any time during the term of this lease may be suffered or sustained by Tenant or by any person, who may at any time during the term of this lease be using or occupying or visiting the leased premises or be in, on or about the same, whether such loss, injury, death or damage shall be caused by or in anywise result from or arise out of any act, omission or negligence of Tenant or of any occupant, subtenant, visitor, or user of any portion of the leased premises, or shall result from or be caused by any other matter or thing, whether of the same kind as or of a different kind than the matters or things above set forth, and Tenant shall

forever indemnify, defend, hold and save Landlord free and harmless of, from and against any and all claims, liability, loss or damage whatsoever on account of any such loss, injury, death or damage. Tenant hereby waives all claims against Landlord for damages to property in, upon or about the premises, from any cause arising at any time during the term of this lease; provided, however, that the foregoing waiver in this sentence contained shall not apply in the event such damage to property or such injuries to persons in, upon or about the premises shall be caused by the negligent acts or omission of Landlord, its agents or employees.

ARTICLE 22

FIRST RIGHT TO PURCHASE

If at any time during the term of this lease, or any extension or renewal thereof, Landlord elects to sell or offers for sale the demised premises, Landlord shall notify Tenant in writing of its intention so to do, and thereafter Tenant shall be allowed a period of sixty (60) working days within which to negotiate for the purchase of said property. In the event Landlord and Tenant fail to agree upon the purchase of said premises within said period of time, and thereafter Landlord sells the property, such sale shall be consummated subject to Tenant's rights under the terms of this lease, or any extension or renewal thereof (including, but not limited to Tenant's renewal rights).

ARTICLE 23

AGREEMENTS IN WRITING

There are no oral agreements or understandings between the parties hereto affecting this lease, and this lease supersedes and cancels any and all previous oral and written negotiations, arrangements, agreements and understandings (including that certain lease dated June 22, 1959 for the premises known as 240-250 Main Street in San Mateo, California) between the parties hereto with respect to the subject matters thereof, and none thereof shall be used to interpret or construe this lease.

ARTICLE 24

ASSIGNEES BOUND

Subject to the provisions of this lease with respect to assignment by Tenant, the covenants, conditions and provisions contained herein shall be binding upon and inure to the benefit of Landlord, its successors and assigns, and Tenant, its successors and assigns.

ARTICLE 25

CAPTIONS AND MARGINAL NOTES

The captions, headings and marginal notes throughout this lease are for convenience and reference only and the words contained therein shall in no way be held or deemed to define, limit, describe, explain, modify, amplify or add to the interpretation, construction or meaning of any provision of or the scope or intent of this lease nor in any way affect this lease.

ARTICLE 26

NO ORAL CHANGES

This lease may not be changed orally but only by an agreement in writing signed by the party against whom enforcement of any waiver, change, modification or discharge is sought.

ARTICLE 27

SUBORDINATION

Landlord agrees that any mortgage, deed of trust, or any instruments of security which have been or shall be placed on the land or buildings, or land and buildings of which the premises form a part, as well as all renewals or extensions thereof, shall be subordinate to this lease and to the interests of Tenant thereunder.

ARTICLE 28

SHORT FORM LEASE

The parties agree to execute this lease, or at Tenant's election, a short form thereof, in a manner so that it may be recorded in the office of the County Recorder.

ARTICLE 29

EFFECT OF CONVEYANCE

In the event of a sale or conveyance by Landlord

to any one person, firm, association or corporation, the entire interest of such conveyor, transferor, or assignor of the real property demised, shall be deemed to have been conveyed, transferred and assigned, if there is delivered to Tenant an original of a valid, binding and sufficient agreement in writing executed and acknowledged by such conveyee, transferee or assignee and directly enforceable by Tenant whereby such conveyee, transferee or assignee assumes and agrees to perform all of the covenants, provisions and conditions of this lease remaining on the part of the conveyor, transferor or assignor to be performed, then and in such event the conveyor, transferor or assignor shall be released from any and all liability arising or accruing under this lease after the date of such conveyance, transfer or assignment.

ARTICLE 30

COMMENCEMENT OF TERM

This lease shall commence on August 1, 1977, or the beginning of the first calendar month after approval by Bank of America Senior Management, whichever date occurs later. In the event that said approval is not obtained, this lease shall terminate and the parties hereto are relieved of any and all obligations hereunder.

ARTICLE 31

TERMINATION OF LEASE

In the event that Tenant is unable to obtain all necessary governmental approvals to make all such improvements on the leased premises as Tenant deems necessary for the conduct of its business, Tenant shall have the option to terminate this lease by giving the Landlord notice within thirty (30) days after Tenant has been denied such approvals.

ARTICLE 32

RENTAL ADJUSTMENT

The rent payable by Tenant to Landlord shall be adjusted at five (5) year intervals, during the initial term of this lease, and any extension hereof pursuant to Article 18 hereof, as herein provided.

Commencing on the date five (5) years after rent commences under this Lease, and periodically every 5 years thereafter, the rental as provided in Paragraph 17 of this lease, shall be adjusted using an adjustment factor based on the change in the cost of living index as defined hereinbelow. The index for each such 5 year period shall be the

quotient of a fraction in which the numerator is the cost of living index for the month six (6) months prior to the beginning of such 5 year period, and the denominator is the cost of living index of the month rent commenced under this Lease. The adjustment factor for each such 5 year period shall be the cumulative total of 100% of any increase from 0% to 35% in the cost of living index during the previous period, 75% of any increase from 35% to 75%, 50% of any increase from 75% to 150% and 25% of any increase over 150%. The total monthly rent for each such 5 year period shall be the total monthly rent of the previous 5 year period multiplied by the adjustment factor. For instance, the adjustment factor for a 40% increase in the cost of living index over five (5) years would be 1.00 $(1 + .35) + .75 (.05) = 1.385$. In no event shall the total monthly rent go below \$2000.

The cost of living index to be used for the determination of the adjusted monthly rent as provided for above shall be the United States Consumer Price Index, for all items (1967 equals 100), published by the Bureau of Labor Statistics of the U.S. Department of Labor. If for any reason whatsoever there is any change in the method of calculation or formulation of said price index, or if that index shall no longer be published, then another index generally recognized as authoritative shall be substituted by agreement. In any event, the base used by any new index, shall be reconciled to the 1967 index.

ARTICLE 33

IMPROVEMENTS AND ALTERATIONS BY TENANT

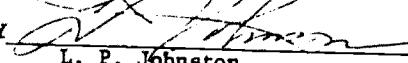
Tenant shall be allowed to demolish existing improvements, to construct new improvements, and to make and perform such interior alterations and remodeling, at Tenant's expense, as Tenant deems necessary for the conduct of its business. It is agreed that at the expiration of the term of this lease, or of any renewal or renewals, extension or extensions thereof, that Tenant shall construct a demising wall, at its expense, on the premises to separate any improvements constructed at Tenant's expense, on the said premises from any

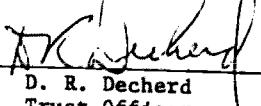
improvements constructed and alterations made and performed on the adjacent Tenant-owned property. All other restoration work required, or work necessary to condition said premises for tenancy shall be at the expense of the Landlord. Notwithstanding the provisions of this Article, Tenant shall not be obligated to construct said demising wall if Tenant elects to terminate this lease in accordance with the provisions of Article 9.2 and 9.3.

Tenant shall be allowed to install, replace, and repair such building mounted signing, business identification symbols and flagpoles as Tenant believes necessary for the conduct of its business.

IN WITNESS WHEREOF, the parties hereto have executed this lease on the day and year first above written.

Bank of America National Trust
and Savings Association, as Trustee
of the Trust Created by Arturo
Micheletti by Substituted Declaration
of Trust dated March 13, 1931.

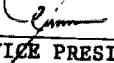
BY 
L. P. Johnston
Vice President

BY 
D. R. Decherd
Trust Officer

LANDLORD

BANK OF AMERICA NATIONAL TRUST
AND SAVINGS ASSOCIATION

BY 
ASSISTANT VICE PRESIDENT

BY 
VICE PRESIDENT

TENANT

AUG 1 1987

AMENDMENT TO SHORT FORM LEASE

THIS AMENDMENT, made this 21st day of April, 1978, by and between BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association, ("Tenant"), and Bank of America National Trust and Savings Association, as Trustee of the Trust created by Arturo Micheletti by Substituted Declaration of Trust dated March 13, 1931, ("Landlord"),

WITNESSETH:

Landlord and Tenant entered into a Lease for premises located in the City of San Mateo, County of San Mateo and State of California, for a term commencing October 1, 1977 and terminating September 30, 2007, subject to that unrecorded Lease between the parties, dated July 18, 1977. A Short Form Lease, dated December 16, 1977, between said parties, was recorded as Doc. 38899AM Reel 7723 Pages 667, 668, 669, and 670 in the Official Records of San Mateo County, California on March 7, 1978.

Landlord and Tenant now wish to amend the Short Form Lease, dated December 16, 1977, to include the following provision, as specified in the unrecorded Lease between the parties:

ALTERATIONS: Tenant shall be allowed to demolish existing improvements, to construct new improvements, and to make and perform such interior alterations and remodelling, at Tenant's expense, as Tenant deems necessary for the conduct of its business. It is agreed that at the expiration of the term of this lease, or of any renewal or renewals, extension or extensions thereof, that Tenant shall construct a demising wall, at its own expense, on the premises to separate any improvements constructed at Tenant's expense on the said premises from any improvements constructed and alterations made and performed on the adjacent Tenant owned property.

IN WITNESS WHEREOF, the parties hereto have executed this instrument the day and year first hereinabove written.

BANK OF AMERICA NATIONAL TRUST
AND SAVINGS ASSOCIATION

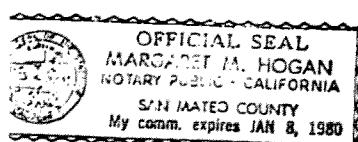
OF CALIFORNIA) ss.
Y OF SAN MATEO)
Cham

Wm. Decherd
President

BANK OF AMERICA NATIONAL TRUST
AND SAVINGS ASSOCIATION,
as Trustee of the Trust created
by Arturo Micheletti by Substituted
Declaration of Trust dated March 13,
1931

On the 25th day of April, 1978, before me, Margaret Hogan, Notary Public in and for said County and State, personally appeared D. R. Decherd, to me to be the Trust Officer, and John Beatty, known to me to be Sr. Property Management Officer of the Bank of America National Trust and Savings Association, a national banking association, that they executed the foregoing instrument as Trustee of the Trust of Arturo Micheletti VIF 245-0, and known to me to be the persons who executed the same on behalf of said national banking association therein named, and acknowledged to me that such national banking association therein named executed the same as Trustee.

WITNESS MY HAND AND OFFICIAL SEAL,



Margaret M. Hogan
Notary Public in and for the County
of San Mateo, State of California

My Commission expires Jan 8, 1980

Exhibit B

1 JAMES M. WAGSTAFFE (95535)
2 ADRIAN J. SAWYER (203712)
3 **KERR & WAGSTAFFE LLP**
4 100 Spear Street, Suite 1800
5 San Francisco, CA 94105-1528
6 Telephone: (415) 371-8500
7 Fax: (415) 371-0500
8 Email: sawyer@kerrwagstaffe.com

5 Attorneys for Plaintiff
6 ART MICHELETTI

ENDORSED
F I L E D
San Francisco County Superior Court

JUL 16 2008

GORDON PARK-LI, Clerk

BY: _____ Deputy Clerk

DEC 19 2008 -9^{AM}

P. NATT

7 DEPARTMENT 212
8

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **COUNTY OF SAN FRANCISCO**

12 ART MICHELETTI, an individual,

13 Plaintiff,

14 v.

15 BANK OF AMERICA, N.A., a national
16 banking association, LARRY P. JOHNSTON,
17 an individual, and DOES 1-10,

18 Defendants.

Case No.

CCG-08-477590

COMPLAINT:

- (1) BREACH OF FIDUCIARY DUTY**
- (2) IMPOSITION OF CONSTRUCTIVE TRUST AND ACCOUNTING**
- (3) WASTE**
- (4) CONSTRUCTIVE FRAUD**
- (5) NEGLIGENCE**
- (6) CONVERSION**

JURY TRIAL DEMANDED

SUMMARY OF CLAIM

1. This is an action involving over thirty years' worth of self-dealing by Bank of America ("BofA"), culminating in events which are only now unfolding. Since 1929, BofA served as the trustee of a trust created by Art Micheletti's now-deceased father, managing (or, more accurately, mismanaging) real estate in the Bay Area for the trust. After years of mismanaging the property, and on the eve of the death of the settlor's wife—an event that would terminate the trust under its terms—BofA took the opportunity to lock up trust property in a below market 30-year lease to itself with an option to renew for 20 years more thereafter. BofA wanted this particular property because BofA owned the property next door.

2. Not surprisingly, BofA negotiated very good terms with itself. BofA paid the trust below market rent that did not even fully track CPI increases, occupying a large portion of the building and subleasing the rest. And BofA allowed itself to do whatever it wanted with the building, subject only to the obligation to put up a demising wall between its property next door and the leased property upon termination of the lease. As a fiduciary who locked up a trust asset in a long-term obligation that exceeded the terms of the trust and was entered into for BofA's own benefit, BofA had a continuing fiduciary duty with respect to the property that continued for the duration of the lease.

3. When the trust terminated shortly after BofA entered into this self-dealing lease, BofA remained in possession of the building, acting as the owner for all intents and purposes, remodeling without telling the Micheletti family, and purporting to manage the property for their benefit. Thus did BofA continue in a fiduciary capacity with respect to the property.

4. Thirty years have passed, and BofA is ready to wash its hands of the building. It has benefited from a below-market rent for years, has damaged the property, and has now returned possession of the damaged building to Plaintiff and the Micheletti family. This action seeks to remedy BofA's breach of trust and waste of the property.

VENUE

5. Venue is proper in this County because a substantial part of the events giving rise to the claim occurred in this County. On information and belief, the lease that gives rise to the

1 breaches of fiduciary duty alleged herein was signed and approved by BofA in San Francisco,
2 and the trust at issue encompassed property located in San Francisco County. In addition, at the
3 time that lease was negotiated, BofA's headquarters were in San Francisco, and even now,
4 BofA's principal place of business in California is located in San Francisco.

PARTIES

6. Plaintiff Art Micheletti, an individual, resides in Santa Clara County, California
and is a beneficiary of the Arturo Micheletti Trust.

8 7. Defendant Bank of America, N.A., is the successor in interest to Bank of
9 America, N.T. & S.A., the trustee of the Arturo Micheletti Trust, and the past landlord and
10 current tenant and sublessor of the property in San Mateo.

11 8. Defendant Larry P. Johnston is a former Vice President and trust officer of Bank
12 of America. On information and belief, Johnston is a California citizen and resides in San Mateo
13 County, California.

14 9. The true names and capacities, whether individual, corporate, associate or
15 otherwise, of defendants DOES 1 through 10, inclusive, are unknown to Plaintiff, who therefore
16 sues said defendants by such fictitious names pursuant to California Code of Civil Procedure
17 section 474. Plaintiff further alleges that each of said fictitious defendants is in some manner
18 responsible for the acts and occurrences herein set forth. Plaintiff will amend this complaint to
19 show these defendants' true names and capacities when the same are ascertained, as well as the
20 manner in which each fictitious defendant is responsible.

21 10. Plaintiff is informed and believes, and upon such basis allege, that at all times
22 herein mentioned, each of the defendants herein was an agent, servant, employee, co-conspirator,
23 partner, joint venturer, wholly owned and controlled subsidiary, and/or alter ego of each of the
24 remaining defendants, and was at all times acting within the course and scope of said agency,
25 service, employment, conspiracy, partnership and/or joint venture.

FACTUAL ALLEGATIONS

Overview Of The Trust

3 11. In 1931, Arturo Micheletti, as trustor, executed a Substituted Declaration of Trust
4 whereby he created the Arturo Micheletti Trust (the “Trust”). BofA was the trustee of the Trust.
5 Arturo Micheletti chose BofA because he had a close personal friendship with A.P. Gianinni, the
6 founder of BofA. Plaintiff Art Micheletti’s middle name, Amadeo, was chosen in honor of A.P.
7 Gianinni, whose first name was also Amadeo. As a result, Arturo Micheletti had every reason to
8 believe that BofA would do the right thing by his family, the beneficiaries of the Trust. As
9 explained below, by 1977, long after Arturo Micheletti and A.P. Gianinni had passed away,
10 BofA was doing anything but the right thing by the beneficiaries.

11 12. In 1940, Arturo Micheletti executed a First Amendment to Substituted
12 Declaration of Trust (the “Trust Document”). BofA remained the trustee. The Trust Document
13 provided that the trust corpus consisted of real property situated in San Francisco and San Mateo
14 Counties. Among the real property that made up the trust corpus was a parcel in San Mateo
15 located on B Street (the “B Street Property”).

16 13. Arturo Micheletti, the trustor, died in September 1940, shortly after executing the
17 Trust Document.

18 14. The Trust Document provided that, after the trustor's death, the trust became
19 irrevocable. The Trust Document further provided that thereafter BofA was to make monthly
20 distributions to Teresa Micheletti, the trustor's wife and Plaintiff Art Micheletti's mother, and to
21 Plaintiff Art Micheletti and his brother, until the termination of the Trust.

15. The Trust Document further provided that that Trust would terminate upon the
death of Teresa Micheletti, if Plaintiff Art Micheletti and his brother were over 25 at the time.

24 16. Upon termination, the principal of the trust estate and "any undistributed income"
25 on that principal was to go in equal shares to Art and his brother.

26 17. In 1980, Teresa Micheletti died. The Trust nominally terminated. Under this
27 nominal termination, the B Street Property went to Art in its entirety.

1 18. Subsequent to the nominal termination of the trust, Plaintiff Art Micheletti deeded
 2 the B Street Property to himself and his wife as community property in 1982. Then, in 1993, the
 3 B Street Property was transferred to a trust set up by Plaintiff Art Micheletti and his wife, the
 4 Arthur J. Micheletti and Janice M. Micheletti 1993 Inter Vivos Trust (“1993 Trust”). Finally, in
 5 1994, the B Street Property was deeded to Plaintiff Art Micheletti and his wife as general
 6 partners of the Micheletti Family Partnership. The 1993 Trust and the Micheletti Family
 7 Partnership have assigned their claims against Defendants to Art Micheletti, Plaintiff herein.

8 **On The Eve of Trust Termination, BofA Enters Into A Self-Dealing Lease**

9 19. The Trust Document gave the trustee the “absolute discretion to lease for terms
 10 within or extending beyond the duration of the trust . . . for such consideration . . . as the trustee
 11 shall in its absolute discretion deem for the best interests of the trust . . .”

12 20. As the emphasized language makes clear, this discretion was supposed to be
 13 exercised in the best interests of the trust. BofA, however, in violation of its fiduciary duty,
 14 leased the B Street Property to itself on very favorable terms, in a long-term lease that would
 15 undoubtedly extend beyond the term of the trust, as described next.

16 21. In 1977, when Teresa Micheletti was 83 years old and in poor health, BofA, the
 17 trustee entered into a ground lease with BofA whereby BofA leased the trust property for 30
 18 years. As it was virtually certain that Teresa Micheletti would not live another 30 years, BofA
 19 knew when it entered into the ground lease that the lease would outlast the Trust.

20 22. BofA was keen to get its hands on the property, as the B Street Property was
 21 adjacent to a BofA branch in San Mateo. BofA believed it could expand its operations in that
 22 branch via a sweetheart deal, that it would negotiate with itself, that would let it have the run of
 23 the B Street Property. Indeed, the year after signing the lease, BofA made a favorable lot-line
 24 adjustment to 255 South B Street for no apparent reason.

25 23. The 1977 lease was enormously favorable to BofA. First, it provided that BofA
 26 would pay only \$2000 per month for the entire B Street Property, which at the time consisted of
 27 5 rentable units. This monthly rent would only adjust every 5 years, and that adjustment was
 28 designed not even to keep pace with the consumer price index, let alone market rents in the area.

1 \$2000 per month was at the time below-market rent for the B Street Property, and market rent in
 2 the Bay Area and for the B Street Property has continually increased at a rate exceeding that of
 3 the CPI since 1977.

4 24. The gap between market rent for the entire B Street Property and the rent BofA
 5 paid to the Trust under the lease of that property grew quickly. Indeed, by 1982, the rent for one
 6 of the smaller units of the B Street Property was already \$675 per month, or less than one third of
 7 the rent BofA was paying the Trust for the entire building. And, while that unit was only
 8 approximately 1,000 square feet, BofA was occupying over 5,000 square feet of the B Street
 9 Property for itself, and paying only \$2,000 per month to the Trust.

10 25. The simple fact is that Defendants made no effort to establish what a fair rental
 11 value would be, despite their fiduciary duties to the beneficiaries of the Trust. Defendants
 12 further intentionally concealed that BofA would pay the trust below-market rent. In fact,
 13 Defendants failed to discuss the rental amount with any beneficiary of the Trust, preferring
 14 instead to engage in cozy internal negotiations.

15 26. The truth about BofA's below market rent arrangement and other misconduct
 16 only came out in 2007, as BofA was preparing to vacate the premises and Plaintiff was in the
 17 process of finding new tenants.

18 27. Defendants' disregard of their fiduciary obligations did not end with including a
 19 term that allowed it to pay below-market rent to the Trust. Defendants went further, and inserted
 20 clauses in the lease allowing BofA to do anything it wanted to the B Street Property, up to and
 21 including demolishing the structures on the B Street Property entirely, provided that at the end of
 22 the lease, BofA put up a demising wall to separate its property (which was adjacent to the B
 23 Street Property) from the B Street Property. In short, BofA was allowed to demolish
 24 improvements, construct new improvements and remodel without limits.

25 28. In addition, the lease omitted terms that would have protected the Trust and are a
 26 standard part of any lease. There was no obligation on BofA's part to return the B Street
 27 Property to the same financial and/or physical condition at its own expense at termination of the
 28 lease, and there was no protection at the termination of tenancy from waste, misuse or

1 destruction by BofA. As explained above, Defendants allowed BofA considerable liberty to do
 2 just the opposite.

3 29. The lease also contained boilerplate terms that were helpful to BofA but
 4 incredibly oppressive to the beneficiaries of the Trust, who were never even given a meaningful
 5 opportunity to negotiate them. The lease contained an arbitration clause and a clause that the
 6 prevailing party in any action to enforce or interpret a term of the lease pay attorneys' fees. Such
 7 terms characteristically favor the larger party in any transaction, as arbitration is expensive and
 8 smaller parties usually cannot face the possibility of paying a prevailing, larger party's attorneys'
 9 fees if they lose a lawsuit.

10 30. Finally, BofA assigned itself the leases in the B Street Property that were in place,
 11 and reserved to itself the right to lease the property, but with no obligation to pass through the
 12 income from any lease to the Trust. Instead, BofA's only rent obligation was to pay the Trust the
 13 exact dollar amount fixed by the lease. To the extent BofA was able to lease the property for
 14 more, it could keep the spread and thereby profit from the lease.

15 31. Despite the presence of these oppressive and self-dealing terms in the lease, BofA
 16 never saw to it that the beneficiaries had separate counsel. Rather, Defendants used a lawyer,
 17 who, on information and belief, later resigned with disciplinary charges pending against him, to
 18 represent BofA and the beneficiaries at once. Defendant Johnston interacted with the attorney.
 19 Defendants never disclosed to Plaintiff that the lease allowed BofA to rent the property at below-
 20 market rent, despite his and BofA's fiduciary obligation to do so.

21 32. There is no question that Defendants knew they had to retain separate counsel for
 22 the beneficiaries and go through a true process to get valid consents. Indeed, in 1959, BofA
 23 leased itself part of the B Street Property for a 25-year term, and retained separate counsel for the
 24 beneficiaries and asked a judge to approve the lease. In short, Defendants knew exactly what
 25 had to be done to fulfill their fiduciary duties, but chose not to do it.

26 33. None of the beneficiaries—including Teresa Micheletti—ever signed the lease.
 27 Only the Bank's representatives signed the lease, as lessor and lessee.

1 **BofA's Conduct During The Term of The Lease**

2 34. Following the nominal termination of the Trust, BofA continued to manage and
 3 operate the property in exactly the same way it had prior to the nominal termination of the Trust.
 4 BofA had a continuing fiduciary obligation to manage the property in the best interests of
 5 Plaintiff Art Micheletti, yet utterly failed to do so.

6 35. BofA purported to terminate the Trust in 1982. It never submitted any of the
 7 transactions to any court for an accounting. Instead, it returned the deed to the B Street Property
 8 to Plaintiff Art Micheletti. BofA never, however, assigned the lease to Plaintiff Art Micheletti.
 9 Indeed, to this day, not a single member of the Micheletti family has signed the lease or any
 10 amendment or assignment thereof.

11 36. Following this, BofA retained possession of the property, paying rent to the
 12 Plaintiff, and later to the Micheletti Family Partnership, while subleasing some of the building
 13 and occupying the rest. BofA occupied the same position with respect to operation of the
 14 building from 1977 to the day it vacated the premises in 2007. BofA never involved Plaintiff Art
 15 Micheletti in management of the building, or informed him that it would look to him for
 16 direction as to how to manage the building, or informed him that it would look for and take
 17 instructions from him as an owner.

18 37. Plaintiff Art Micheletti reposed trust and confidence in BofA to act in his best
 19 interests with respect to the B Street Property.

20 38. BofA acted with impunity and never gave Plaintiff Art Micheletti any indication
 21 that it did not consider itself a fiduciary with respect to the B Street Property. In 1994-1995,
 22 BofA remodeled the property without any notice to Plaintiff Art Micheletti in a way that
 23 eliminated two of the six units that were in the B Street Property. The 1994-1995 remodel was
 24 based on plans that were never shown to the Michelettis. In that remodel, BofA demolished the
 25 rear building completely and built a new section that can only be accessed from its adjacent
 26 property. It further installed an elevator, a main electrical panel, telephone room and new
 27 stairways, destroying the two units as rental space.

1 39. BofA has continued to remodel as it sees fit, without input from Plaintiff Art
 2 Micheletti or any member of the Micheletti family.

3 40. Further, BofA, while in possession of the B Street Property, acted as the property
 4 manager and selected property managers without any involvement by the Michelettis, again
 5 giving every indication that it continued to operate in the role it had as of 1977.

6 41. BofA has now informed Plaintiff Art Micheletti and the Partnership that it will
 7 not renew the 30-year lease for five more years, and plans to return the building to them.
 8 Because of BofA's conduct with respect to the building, however, two of the six units no longer
 9 exist much of remainder is essentially unrentable. BofA, having got its hands on the property
 10 years ago in a self-dealing transaction, and having operated the property at its whim for years
 11 with no regard to the Michelettis, now wants to wash its hands of the property and stick the
 12 Michelettis with the bill. The Michelettis are now faced with the return of a building that is
 13 worth far less than it would have been had BofA acted appropriately.

14

FIRST CAUSE OF ACTION
Breach of Fiduciary Duty
(Against All Defendants)

15

16

17 42. Plaintiff hereby incorporates by reference each and every allegation contained in
 18 paragraphs 1 through 41, as though fully set forth herein.

19

20 43. BofA, and Defendant Larry Johnston as Vice President and trust officer, owed
 21 Plaintiff fiduciary duties of loyalty and due care both during the Trust and after its nominal
 22 termination. BofA also owed this duty to the Arthur and Janice Micheletti Inter Vivos Trust and
 23 the Micheletti Family Partnership as the successors in interest to Plaintiff Art Micheletti's
 24 interest.

25

26 44. Defendants breached this duty of loyalty, *inter alia*, by (1) entering into the self-
 27 dealing lease described herein, which allowed it to do whatever it wanted with the property, (2)
 28 profiting at the expense of the trust beneficiaries by paying below market rent to the Trust while
 29 occupying a large portion of the building for itself and subleasing the rest, and (3) causing
 30 damage to the building by operating it solely for its own benefit.

45. BofA further breached its duty of due care by failing to manage the B Street Property as a reasonably prudent person would have in the exercise of its own affairs.

46. As a Vice President and trust officer, Defendant Johnston personally participated in these breaches, *inter alia*, by negotiating the lease with counterparts at BofA and obtaining approval of it, all to the detriment of Plaintiff.

47. As a direct and proximate result of these breaches, Plaintiff has suffered damages in an amount according to proof.

48. Defendants' conduct was wanton, malicious, and oppressive, justifying an award of punitive damages.

**SECOND CAUSE OF ACTION
IMPOSITION OF CONSTRUCTIVE TRUST AND ACCOUNTING
(Against BofA and Does 1-5)**

49. Plaintiff hereby incorporates by reference each and every allegation contained in paragraphs 1 through 48, as though fully set forth herein.

50. By entering into the self-dealing lease, BofA allowed itself the opportunity to profit from paying the trust a below-market rent. In breach of its fiduciary obligations, BofA would pay the trust a below-market rent, yet occupy part of the building for itself and sub-let the rest of the building, allowing BofA the opportunity to profit by the below-market rent arrangement. Such profit rightfully belongs to Plaintiff.

51. BofA intentionally concealed from Plaintiff that the rent paid under the agreement was below-market rent.

52. BofA in fact profited from the below-market rent arrangement, in violation of its fiduciary obligation to Plaintiff.

53. By virtue of the above wrongful acts, BofA holds its profits from the below-market rent arrangement in constructive trust for the benefit of Plaintiff.

54. BofA has not disclosed to Plaintiff the amount by which it profited from the below-market rent arrangement. An accounting is therefore necessary to determine this amount.

1 **THIRD CAUSE OF ACTION**
 2 **Waste**
 3 **(Against BofA and Does 1-5)**

4 55. Plaintiff hereby incorporates by reference each and every allegation contained in
 5 paragraphs 1 through 54, as though fully set forth herein.

6 56. Beginning with the termination of the trust, BofA began to lease the B Street
 7 Property from the Plaintiff.

8 57. BofA had possession of the B Street Property at that time and has remained in
 9 possession every since.

10 58. Commencing at some point unknown, and continuing to the present day, BofA
 11 has caused injury to the premises by committing waste thereon by the acts described above.
 12 When BofA announced it would not renew the lease and subsequently vacated the premises,
 13 Plaintiff was damaged.

14 59. Before the commencement of BofA's conduct, the B Street Property consisted of
 15 six rentable units. It now consists of three units with a vastly diminished value. As a direct and
 16 proximate result of BofA's conduct, Plaintiff has suffered damages in an amount according to
 17 proof.

18 60. Each act and omission of Defendant as alleged above was done intentionally and
 19 intentionally concealed from Plaintiff. Defendant willfully and maliciously engaged in this
 20 conduct with the full knowledge that it would result in substantial damage to the premises and
 21 Plaintiff's interest in the premises. Therefore, Plaintiff is entitled to recover treble damages from
 22 BofA.

23 **FOURTH CAUSE OF ACTION**
 24 **Constructive Fraud**
 25 **(Against All Defendants)**

26 61. Plaintiff hereby incorporates by reference each and every allegation contained in
 27 paragraphs 1 through 60, as though fully set forth herein.

28 62. BofA was the trustee of the Trust at the time the lease was entered into. Further,
 29 BofA remained in a fiduciary position with respect to the B Street Property after the nominal

1 termination of the Trust. As such, BofA was in a fiduciary relationship with respect to the
2 beneficiary, Plaintiff, and the Assignors as successors in interest to Art Micheletti.

3 63. Defendant Johnston, as a Vice President and Trust Officer, likewise owed
4 Plaintiff a fiduciary duty.

5 64. Despite being in this position, BofA gained an advantage at the expense of the
6 beneficiaries of the Trust by entering into the below-market rent arrangement, and continued to
7 profit from this arrangement during the term of the lease. Defendant Johnston participated in this
8 breach. Despite their fiduciary obligations, Defendants failed to disclose at any time that it was
9 in fact profiting from the below-market rent arrangement.

10 65. Defendants did the acts herein alleged with the intent to deceive and defraud
11 Plaintiff, and concealed from Plaintiff the true market rental value of the property.

12 66. Plaintiff in fact placed confidence and reliance in Defendants until on or about
13 mid-2007, when BofA began preparing to demise the property, when Plaintiff discovered that in
14 fact BofA had been profiting from the below market rental arrangement for years.

FIFTH CAUSE OF ACTION

Negligence

(Against BofA and Does 4-10)

18 67. Plaintiff hereby incorporates by reference each and every allegation contained in
19 paragraphs 1 through 66, as though fully set forth herein.

20 68. BofA managed the property for Plaintiff and Assignors. It therefore owed a duty
21 of due care to them.

69. BofA failed to exercise due care in its management of the B Street Property.

23 70. As a direct and proximate result of BofA's failure to exercise due care, Plaintiff
24 and Assignors has been damaged in an amount to be proved at trial, including by the return of
25 the B Street Property in condition that is essentially unrentable.

71. BofA's conduct was wanton, malicious, and oppressive, warranting an award of
punitive damages.

1 **SIXTH CAUSE OF ACTION**
 2 **Conversion**
 3 **(Against All Defendants)**

4 72. Plaintiff hereby incorporates by reference each and every allegation contained in
 5 paragraphs 1 through 71, as though fully set forth herein.

6 73. BofA obtained the leasehold interest in the B Street Property by its own breach of
 7 fiduciary duty. It then converted the property to its own use for the next 30 years.

8 74. As the Vice President and Trust Officer, Defendant Johnston personally
 9 participated in wrongfully obtaining the B Street Property for BofA's own use.

10 75. As direct and result of BofA's unauthorized use of the B Street Property, Plaintiff
 11 was deprived of the use of the B Street Property, including the ability to lease it for market rent.

12 76. Defendant's conduct was wanton, malicious, and oppressive, warranting an award
 13 of punitive damages.

PRAAYER FOR RELIEF

14 WHEREFORE, Plaintiff prays for relief against Defendants as follows:

- 15 1. For compensatory damages in an amount according to proof;
- 16 2. For a declaration that BofA holds profits it made by the below-market rent
 17 arrangement in constructive trust for Plaintiff;
- 18 3. For an accounting;
- 19 4. For pre-judgment interest;
- 20 5. For costs of suit;
- 21 6. For punitive damages.

22 DATED: July 16, 2008

KERR & WAGSTAFFE LLP

23 By

ADRIAN J. SAWYER

24 25 26 27 28
 Attorneys for Plaintiff
 ART MICHELETTI

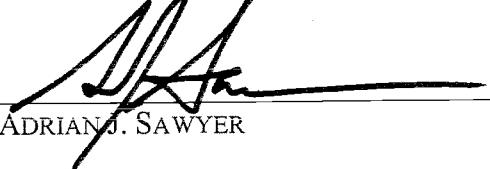
1 **JURY DEMAND**

2 Plaintiff demands a trial by jury.

3 DATED: July 16, 2008

4 **KERR & WAGSTAFFE LLP**

5 By

6 
ADRIAN J. SAWYER

7 Attorneys for Plaintiff
8 ART MICHELETTI

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Exhibit C

1 BUCHALTER NEMER
2 A Professional Corporation
3 JAMES B. WRIGHT (SBN: 63241)
4 RICHARD C. DARWIN (SBN: 161245)
5 333 Market Street, 25th Floor
San Francisco, CA 94105-2126
Telephone: (415) 227-0900
Facsimile: (415) 227-0770
jwright@buchalter.com

6 Attorneys for Defendants
BANK OF AMERICA, N.A. and LARRY JOHNSTON

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

11 | ART MICHELETTI, an individual,

12 Plaintiff,

13 |

vs.

BANK OF AMERICA, N.A., a national banking association, LARRY JOHNSTON, an individual, and DOES 1-10.

16 Defendants.

CASE NO.

**NOTICE OF REMOVAL OF CIVIL
ACTION PURSUANT TO 28 U.S.C.
SECTIONS 1441(a), 1441(b), AND 1446
(DIVERSITY)**

TO THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, ALL INTERESTED PARTIES, AND THEIR
COUNSEL OF RECORD:

PLEASE TAKE NOTICE that Defendants Bank of America, N.A. ("Bank of America") and Larry Johnston hereby remove the above-captioned action, Case No. CGC 08-477590, currently pending in the Superior Court of the State of California in and for the County of San Francisco, to the United States District Court for the Northern District of California, pursuant to 28 U.S.C. Sections 1441(a), 1441(b), and 1446. Federal jurisdiction over this action is proper on the basis of diversity jurisdiction under 28 U.S.C. Sections 1332 and 1441(b). Removal is based upon the following grounds:

1 1. On or about June 11, 2008, Bank of America filed a petition to compel arbitration
 2 in the United States District Court for the Northern District of California, entitled “*Bank of*
 3 *America, N.A., a national banking association, Petitioner, v. Micheletti Family Partnership, a*
 4 *California limited partnership, Arthur Micheletti, an individual, and Janice Micheletti, an*
 5 *individual, Respondents,*” Case No. 08 CV-02902 JSW (the “Federal Petition”). Arthur
 6 Micheletti, Janice Micheletti, and the Micheletti Family Partnership were all hand served with a
 7 summons and the Federal Petition on June 13, 2008. In the Federal Petition, Bank of America
 8 alleged that disputes have arisen between itself and Arthur Micheletti, Janice Micheletti, and the
 9 Micheletti Family Partnership (“Partnership”) relating to the terms of a Lease Agreement for
 10 premises located in San Mateo, California (the “Lease Agreement”), and relating to allegations by
 11 the Michelettis that Bank of America breached a fiduciary duty in its dual role as the trustee of a
 12 trust that owned the subject premises, and as the tenant in the Lease Agreement. On the basis of
 13 those disputes, and the existence of an arbitration provision in the Lease Agreement, Bank of
 14 America seeks an order from this federal district court compelling the parties to arbitrate the
 15 aforementioned disputes.

16 2. On or about July 16, 2008, in an effort to avoid federal jurisdiction, plaintiff Art
 17 Micheletti (“Micheletti”) filed an action in the Superior Court of the State of California in and for
 18 the County of San Francisco, entitled “*Art Micheletti, an individual, Plaintiff v. Bank of America,*
 19 *N.A., a national banking association, Larry Johnston, an individual, and Does 1-10, Defendants,*”
 20 Case No. CGC 08-477590 (the “State Action”) to adjudicate in state court the same claims raised
 21 in the Federal Petition. On July 16, 2008, the San Francisco Superior Court issued a notice
 22 scheduling a case management conference. True and correct copies of the summons, complaint,
 23 and the notice of case management conference, which together constitute the entirety of the
 24 process, pleadings and orders in the State Action, are attached hereto as Exhibit A.

25 3. The complaint in the State Action alleges causes of action for (1) breach of
 26 fiduciary duty, (2) imposition of a constructive trust, (3) waste, (4) constructive fraud,
 27 (5) negligence, and (6) conversion. The summons and complaint in the State Action were served
 28 on Bank of America and Johnston, through their counsel, by hand on July 18, 2008.
 BN 2106201v3

1 4. Pursuant to 28 U.S.C. Section 1446 and Rule 6 of the Federal Rules of Civil
2 Procedure, Bank of America and Mr. Johnston have until August 18, 2008 to file a notice of
3 removal. This notice of removal, which is jointly filed on behalf of Bank of America and
4 Mr. Johnston, is therefore timely filed.

JURISDICTION

5. The State Action is a matter over which this Court has original diversity
jurisdiction under 28 U.S.C. Section 1332, and is properly removable pursuant to the provisions
of 28 U.S.C. Sections 1441(a) and (b), because it is a civil action wherein the amount in
controversy exceeds the sum of \$75,000, exclusive of costs and interest, and – with the exception
of a sham defendant who may be disregarded under the “fraudulent joinder” rule – it is between
citizens of different states, as set forth below.

12 6. Plaintiff Micheletti is a resident of San Mateo County, California.

13 7. Defendant Bank of America is a national banking association with its headquarters
14 in Charlotte, North Carolina.

15 8. Defendant Larry Johnston is a 78-year old former employee of Bank of America
16 and is a resident of San Mateo County, California. Mr. Johnston is identified and sued in the
17 State Action solely in his capacity as a Bank of America employee; the complaint does not
18 contain a single allegation against Mr. Johnston that is not explicitly premised upon his role as an
19 employee of the bank. *See, e.g.*, Complaint at ¶¶ 8, 31, 43, 46, 63, and 74. Rather, Mr. Johnston
20 was included as a defendant for the sole purpose of defeating diversity jurisdiction and avoiding
21 the jurisdiction of the federal courts. Because there is no valid legal or factual basis upon which
22 Mr. Johnston may be held independently liable to Micheletti, and that no cause of action can be
23 stated against him, Mr. Johnston's joinder as a defendant in the State Action was fraudulent and
24 must be disregarded for purposes of determining the existence of diversity jurisdiction. *See,*
25 *Morris v. Princess Cruises, Inc.* (9th Cir. 2001) 236 F.3d 1061; *McCabe v. General Foods, Inc.*
26 (9th Cir. 1987) 811 F.2d 1336, 1339.

27 9. The complaint in the State Action does not contain a specific reference to an
28 amount in controversy. When the amount in controversy is unclear, the Court may consider the

amount in controversy based on the damages that can reasonably be anticipated at the time of removal. *Simmons v. PCR Technology*, 209 F.Supp.2d 1029, 1035 (N.D. Cal. 2002).

10. On or about July 18, 1977, Bank of America N.T. & S.A., as the tenant, entered into the Lease Agreement with the Arturo Micheletti Trust ("Trust") as landlord, for premises located in San Mateo, California. Micheletti was a beneficiary of the Trust. Bank of America, N.A. is the successor in interest to Bank of America N.T. & S.A. As outlined in the complaint in the State Action and the Federal Petition, disputes have arisen between the Bank and Micheletti regarding the Lease Agreement. Micheletti has alleged that the Lease Agreement is invalid and should be revoked because the Bank's predecessor-in-interest allegedly breached its fiduciary duties as the trustee of the Trust by signing the Lease Agreement both as trustee/landlord and as tenant. These are the same disputes that form the subject matter of the Federal Petition described above. As a consequence of the disputes outlined in the complaint, Micheletti is demanding that the Bank perform extensive repairs at the leased premises and is asserting damage claims in excess of \$1 million. Micheletti's alleged damages therefore exceed the \$75,000 amount in controversy requirement.

INTRADISTRICT ASSIGNMENT

11. Pursuant to Local Rule 3-2(d), this action should be assigned to the San Francisco or Oakland Division, as a substantial part of the events giving rise to the claims addressed in the State Action occurred in San Mateo County, California.

NOTICE

12. Attached hereto as Exhibit "B" is a copy of the Notice to State Court and Adverse Parties of Removal of Civil Action to United States District Court under 28 U.S.C. §§ 1441 and 1446 Based On Diversity Jurisdiction. Bank of America will promptly serve Exhibit B on counsel for Micheletti, and will file it with the Clerk of the San Francisco Superior Court. *See* 28 U.S.C. §§ 1446(a), (d).

WHEREFORE, Bank of America prays that the above-entitled action now pending in the Superior Court of the State of California in and for the County of San Francisco be removed to

1 this Court pursuant to 28 U.S.C. § 1441(b).

2 DATED: July 24, 2008

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BUCHALTER NEMER
A Professional Corporation

By: 

RICHARD C. DARWIN
Attorneys for Defendants
BANK OF AMERICA, N.A. and LARRY
JOHNSTON

NOTICE TO DEFENDANT:

(AVISO AL DEMANDADO):

BANK OF AMERICA, N.A., a national banking association, and LARRY P. JOHNSTON, an individual

YOU ARE BEING SUED BY PLAINTIFF:

(LO ESTÁ DEMANDANDO EL DEMANDANTE):

ART MICHELETTI, an individual

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.courtinfo.ca.gov/selfhelp/espanol/), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.courtinfo.ca.gov/selfhelp/espanol/) o poniéndose en contacto con la corte o el colegio de abogados locales.

The name and address of the court:
(El nombre y dirección de la corte es):

Court of Appeal

CASE NUMBER
(Número del Caso):SAN FRANCISCO SUPERIOR COURT
400 McAllister St.
San Francisco 94102

6280427759

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

James M. Wagstaffe (95535) (415) 371-8500

Adrian J. Sawyer (203712)

Kerr & Wagstaffe LLP

100 Spear St., Ste. 1800, San Francisco, CA, 94105

DATE:

6/23/08

Clerk, by _____

RE KMT

Deputy

(Fecha) (Secretario) (Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

NOTICE TO THE PERSON SERVED: You are served

1. _____ as an individual defendant.
2. _____ as the person sued under the fictitious name of (specify):
3. _____ on behalf: (specify): Bank of America N.A.
under: CCP 416.10 (corporation) CCP 416.60 (minor)
 CCP 416.20 (defunct corporation) CCP 416.70 (conservatee)
 CCP 416.40 (association or partnership) CCP 416.90 (authorized person)
 other (specify):
4. _____ by personal delivery on (date):

Page 1 of 1

1 JAMES M. WAGSTAFFE (95535)
2 ADRIAN J. SAWYER (203712)
3 KERR & WAGSTAFFE LLP
4 100 Spear Street, Suite 1800
5 San Francisco, CA 94105-1528
6 Telephone: (415) 371-8500
7 Fax: (415) 371-0500
8 Email: sawyer@kerrwagstaffe.com

9 Attorneys for Plaintiff
10 ART MICHELETTI

ENDORSED
FILED
San Francisco County Superior Court

JUL 16 2008

GORDON PARKER, Clerk

BY: _____ Deputy Clerk

P-NAT

CASE MANAGEMENT CONFERENCE SET

DEC 19 2008 - 9 AM

DEPARTMENT 212

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

ART MICHELETTI, an individual,

Plaintiff,

v.

BANK OF AMERICA, N.A., a national
banking association, LARRY P. JOHNSTON,
an individual, and DOES 1-10,

Defendants.

Case No.

COMPLAINT: 08CV02902-BJF

- (1) BREACH OF FIDUCIARY DUTY
- (2) IMPOSITION OF CONSTRUCTIVE TRUST AND ACCOUNTING
- (3) WASTE
- (4) CONSTRUCTIVE FRAUD
- (5) NEGLIGENCE
- (6) CONVERSION

JURY TRIAL DEMANDED

SUMMARY OF CLAIM

1. This is an action involving over thirty years' worth of self-dealing by Bank of America ("BofA"), culminating in events which are only now unfolding. Since 1929, BofA served as the trustee of a trust created by Art Micheletti's now-deceased father, managing (or, more accurately, mismanaging) real estate in the Bay Area for the trust. After years of mismanaging the property, and on the eve of the death of the settlor's wife—an event that would terminate the trust under its terms—BofA took the opportunity to lock up trust property in a below market 30-year lease to itself with an option to renew for 20 years more thereafter. BofA wanted this particular property because BofA owned the property next door.

10 2. Not surprisingly, BofA negotiated very good terms with itself. BofA paid the
11 trust below market rent that did not even fully track CPI increases, occupying a large portion of
12 the building and subleasing the rest. And BofA allowed itself to do whatever it wanted with the
13 building, subject only to the obligation to put up a demising wall between its property next door
14 and the leased property upon termination of the lease. As a fiduciary who locked up a trust asset
15 in a long-term obligation that exceeded the terms of the trust and was entered into for BofA's
16 own benefit, BofA had a continuing fiduciary duty with respect to the property that continued for
17 the duration of the lease.

18 3. When the trust terminated shortly after BofA entered into this self-dealing lease,
19 BofA remained in possession of the building, acting as the owner for all intents and purposes,
20 remodeling without telling the Micheletti family, and purporting to manage the property for their
21 benefit. Thus did BofA continue in a fiduciary capacity with respect to the property.

22 4. Thirty years have passed, and BofA is ready to wash its hands of the building. It
23 has benefited from a below-market rent for years, has damaged the property, and has now
24 returned possession of the damaged building to Plaintiff and the Micheletti family. This action
25 seeks to remedy BofA's breach of trust and waste of the property.

VENUE

27 5. Venue is proper in this County because a substantial part of the events giving rise
28 to the claim occurred in this County. On information and belief, the lease that gives rise to the

1 breaches of fiduciary duty alleged herein was signed and approved by BofA in San Francisco,
2 and the trust at issue encompassed property located in San Francisco County. In addition, at the
3 time that lease was negotiated, BofA's headquarters were in San Francisco, and even now,
4 BofA's principal place of business in California is located in San Francisco.

PARTIES

6 6. Plaintiff Art Micheletti, an individual, resides in Santa Clara County, California
7 and is a beneficiary of the Arturo Micheletti Trust.

8 7. Defendant Bank of America, N.A., is the successor in interest to Bank of
9 America, N.T. & S.A., the trustee of the Arturo Micheletti Trust, and the past landlord and
10 current tenant and sublessor of the property in San Mateo.

11 8. Defendant Larry P. Johnston is a former Vice President and trust officer of Bank
12 of America. On information and belief, Johnston is a California citizen and resides in San Mateo
13 County, California.

14 9. The true names and capacities, whether individual, corporate, associate or
15 otherwise, of defendants DOES 1 through 10, inclusive, are unknown to Plaintiff, who therefore
16 sues said defendants by such fictitious names pursuant to California Code of Civil Procedure
17 section 1714. Plaintiff further alleges that each of said fictitious defendants is in some manner
18 responsible for the acts and occurrences herein set forth. Plaintiff will amend this complaint to
19 show these defendants' true names and capacities when the same are ascertained, as well as the
20 manner in which each fictitious defendant is responsible.

21 10. Plaintiff is informed and believes, and upon such basis allege, that at all times
22 herein mentioned, each of the defendants herein was an agent, servant, employee, co-conspirator,
23 partner, joint venturer, wholly owned and controlled subsidiary, and/or alter ego of each of the
24 remaining defendants, and was at all times acting within the course and scope of said agency,
25 service, employment, conspiracy, partnership and/or joint venture.

FACTUAL ALLEGATIONS

Overview Of The Trust

11. In 1931, Arturo Micheletti, as trustor, executed a Substituted Declaration of Trust
 4 whereby he created the Arturo Micheletti Trust (the "Trust"). BofA was the trustee of the Trust.
 5 Arturo Micheletti chose BofA because he had a close personal friendship with A.P. Gianinni, the
 6 founder of BofA. Plaintiff Art Micheletti's middle name, Amadeo, was chosen in honor of A.P.
 7 Gianinni, whose first name was also Amadeo. As a result, Arturo Micheletti had every reason to
 8 believe that BofA would do the right thing by his family, the beneficiaries of the Trust. As
 9 explained below, by 1977, long after Arturo Micheletti and A.P. Gianinni had passed away,
 10 BofA was doing anything but the right thing by the beneficiaries.

11. 12. In 1940, Arturo Micheletti executed a First Amendment to Substituted
 13 Declaration of Trust (the "Trust Document"). BofA remained the trustee. The Trust Document
 14 provided that the trust corpus consisted of real property situated in San Francisco and San Mateo
 15 Counties. Among the real property that made up the trust corpus was a parcel in San Mateo
 located on B Street (the "B Street Property").

16. 13. Arturo Micheletti, the trustor, died in September 1940, shortly after executing the
 17 Trust Document.

18. 14. The Trust Document provided that, after the trustor's death, the trust became
 19 irrevocable. The Trust Document further provided that thereafter BofA was to make monthly
 20 distributions to Teresa Micheletti, the trustor's wife and Plaintiff Art Micheletti's mother, and to
 21 Plaintiff Art Micheletti and his brother, until the termination of the Trust.

22. 15. The Trust Document further provided that that Trust would terminate upon the
 23 death of Teresa Micheletti, if Plaintiff Art Micheletti and his brother were over 25 at the time.

24. 16. Upon termination, the principal of the trust estate and "any undistributed income"
 25 on that principal was to go in equal shares to Art and his brother.

26. 17. In 1980, Teresa Micheletti died. The Trust nominally terminated. Under this
 27 nominal termination, the B Street Property went to Art in its entirety.

28

KERR

1 18. Subsequent to the nominal termination of the trust, Plaintiff Art Micheletti deeded
 2 the B Street Property to himself and his wife as community property in 1982. Then, in 1993, the
 3 B Street Property was transferred to a trust set up by Plaintiff Art Micheletti and his wife, the
 4 Arthur J. Micheletti and Janice M. Micheletti 1993 Inter Vivos Trust ("1993 Trust"). Finally, in
 5 1994, the B Street Property was deeded to Plaintiff Art Micheletti and his wife as general
 6 partners of the Micheletti Family Partnership. The 1993 Trust and the Micheletti Family
 7 Partnership have assigned their claims against Defendants to Art Micheletti, Plaintiff herein.

8 **On The Eve of Trust Termination, BofA Enters Into A Self-Dealing Lease**

9 19. The Trust Document gave the trustee the "absolute discretion to lease for terms
 10 within or extending beyond the duration of the trust . . . for such consideration . . . as the trustee
 11 shall in its absolute discretion deem for the best interests of the trust"

12 20. As the emphasized language makes clear, this discretion was supposed to be
 13 exercised in the best interests of the trust. BofA, however, in violation of its fiduciary duty,
 14 leased the B Street Property to itself on very favorable terms, in a long-term lease that would
 15 undoubtedly extend beyond the term of the trust, as described next.

16 21. In 1977, when Teresa Micheletti was 83 years old and in poor health, BofA, the
 17 trustee entered into a ground lease with BofA whereby BofA leased the trust property for 30
 18 years. As it was virtually certain that Teresa Micheletti would not live another 30 years, BofA
 19 knew when it entered into the ground lease that the lease would outlast the Trust.

20 22. BofA was keen to get its hands on the property, as the B Street Property was
 21 adjacent to a BofA branch in San Mateo. BofA believed it could expand its operations in that
 22 branch via a sweetheart deal, that it would negotiate with itself, that would let it have the run of
 23 the B Street Property. Indeed, the year after signing the lease, BofA made a favorable lot-line
 24 adjustment to 255 South B Street for no apparent reason.

25 23. The 1977 lease was enormously favorable to BofA. First, it provided that BofA
 26 would pay only \$2000 per month for the entire B Street Property, which at the time consisted of
 27 5 rentable units. This monthly rent would only adjust every 5 years, and that adjustment was
 28 designed not even to keep pace with the consumer price index, let alone market rents in the area.

1 \$2000 per month was at the time below-market rent for the B Street Property, and market rent in
 2 the Bay Area and for the B Street Property has continually increased at a rate exceeding that of
 3 the CPI since 1977.

4 24. The gap between market rent for the entire B Street Property and the rent BofA
 5 paid to the Trust under the lease of that property grew quickly. Indeed, by 1982, the rent for one
 6 of the smaller units of the B Street Property was already \$675 per month, or less than one third of
 7 the rent BofA was paying the Trust for the entire building. And, while that unit was only
 8 approximately 1,000 square feet, BofA was occupying over 5,000 square feet of the B Street
 9 Property for itself, and paying only \$2,000 per month to the Trust.

10 25. The simple fact is that Defendants made no effort to establish what a fair rental
 11 value would be, despite their fiduciary duties to the beneficiaries of the Trust. Defendants
 12 further intentionally concealed that BofA would pay the trust below-market rent. In fact,
 13 Defendants failed to discuss the rental amount with any beneficiary of the Trust, preferring
 14 instead to engage in cozy internal negotiations.

15 26. The truth about BofA's below market rent arrangement and other misconduct
 16 only came out in 2007, as BofA was preparing to vacate the premises and Plaintiff was in the
 17 process of finding new tenants.

18 27. Defendants' disregard of their fiduciary obligations did not end with including a
 19 term that allowed it to pay below-market rent to the Trust. Defendants went further, and inserted
 20 clauses in the lease allowing BofA to do anything it wanted to the B Street Property, up to and
 21 including demolishing the structures on the B Street Property entirely, provided that at the end of
 22 the lease, BofA put up a demising wall to separate its property (which was adjacent to the B
 23 Street Property) from the B Street Property. In short, BofA was allowed to demolish
 24 improvements, construct new improvements and remodel without limits.

25 28. In addition, the lease omitted terms that would have protected the Trust and are a
 26 standard part of any lease. There was no obligation on BofA's part to return the B Street
 27 Property to the same financial and/or physical condition at its own expense at termination of the
 28 lease, and there was no protection at the termination of tenancy from waste, misuse or

1 destruction by BofA. As explained above, Defendants allowed BofA considerable liberty to do
 2 just the opposite.

3 29. The lease also contained boilerplate terms that were helpful to BofA but
 4 incredibly oppressive to the beneficiaries of the Trust, who were never even given a meaningful
 5 opportunity to negotiate them. The lease contained an arbitration clause and a clause that the
 6 prevailing party in any action to enforce or interpret a term of the lease pay attorneys' fees. Such
 7 terms characteristically favor the larger party in any transaction, as arbitration is expensive and
 8 smaller parties usually cannot face the possibility of paying a prevailing, larger party's attorneys'
 9 fees if they lose a lawsuit.

10 30. Finally, BofA assigned itself the leases in the B Street Property that were in place,
 11 and reserved to itself the right to lease the property, but with no obligation to pass through the
 12 income from any lease to the Trust. Instead, BofA's only rent obligation was to pay the Trust the
 13 exact dollar amount fixed by the lease. To the extent BofA was able to lease the property for
 14 more, it could keep the spread and thereby profit from the lease.

15 31. Despite the presence of these oppressive and self-dealing terms in the lease, BofA
 16 never saw to it that the beneficiaries had separate counsel. Rather, Defendants used a lawyer,
 17 ~~who, on information and belief, later resigned with disciplinary charges pending against him,~~ to
 18 represent BofA and the beneficiaries at once. Defendant Johnston interacted with the attorney.
 19 Defendants never disclosed to Plaintiff that the lease allowed BofA to rent the property at below-
 20 market rent, despite his and BofA's fiduciary obligation to do so.

21 32. There is no question that Defendants knew they had to retain separate counsel for
 22 the beneficiaries and go through a true process to get valid consents. Indeed, in 1959, BofA
 23 leased itself part of the B Street Property for a 25-year term, and retained separate counsel for the
 24 beneficiaries and asked a judge to approve the lease. In short, Defendants knew exactly what
 25 had to be done to fulfill their fiduciary duties, but chose not to do it.

26 33. None of the beneficiaries—including Teresa Micheletti—ever signed the lease.
 27 Only the Bank's representatives signed the lease, as lessor and lessee.

28

KERR
MICHAELETTI
LLC

1 BofA's Conduct During The Term of The Lease

2 34. Following the nominal termination of the Trust, BofA continued to manage and
 3 operate the property in exactly the same way it had prior to the nominal termination of the Trust.
 4 BofA had a continuing fiduciary obligation to manage the property in the best interests of
 5 Plaintiff Art Micheletti, yet utterly failed to do so.

6 35. BofA purported to terminate the Trust in 1982. It never submitted any of the
 7 transactions to any court for an accounting. Instead, it returned the deed to the B Street Property
 8 to Plaintiff Art Micheletti. BofA never, however, assigned the lease to Plaintiff Art Micheletti.
 9 Indeed, to this day, not a single member of the Micheletti family has signed the lease or any
 10 amendment or assignment thereof.

11 36. Following this, BofA retained possession of the property, paying rent to the
 12 Plaintiff, and later to the Micheletti Family Partnership, while subleasing some of the building
 13 and occupying the rest. BofA occupied the same position with respect to operation of the
 14 building from 1977 to the day it vacated the premises in 2007. BofA never involved Plaintiff Art
 15 Micheletti in management of the building, or informed him that it would look to him for
 16 direction as to how to manage the building, or informed him that it would look for and take
 17 instructions from him as an owner.

18 37. Plaintiff Art Micheletti reposed trust and confidence in BofA to act in his best
 19 interests with respect to the B Street Property.

20 38. BofA acted with impunity and never gave Plaintiff Art Micheletti any indication
 21 that it did not consider itself a fiduciary with respect to the B Street Property. In 1994-1995,
 22 BofA remodeled the property without any notice to Plaintiff Art Micheletti in a way that
 23 eliminated two of the six units that were in the B Street Property. The 1994-1995 remodel was
 24 based on plans that were never shown to the Michelettis. In that remodel, BofA demolished the
 25 rear building completely and built a new section that can only be accessed from its adjacent
 26 property. It further installed an elevator, a main electrical panel, telephone room and new
 27 stairways, destroying the two units as rental space.

28

1 39. BofA has continued to remodel as it sees fit, without input from Plaintiff Art
 2 Micheletti or any member of the Micheletti family.

3 40. Further, BofA, while in possession of the B Street Property, acted as the property
 4 manager and selected property managers without any involvement by the Michelettis, again
 5 giving every indication that it continued to operate in the role it had as of 1977.

6 41. BofA has now informed Plaintiff Art Micheletti and the Partnership that it will
 7 not renew the 30-year lease for five more years, and plans to return the building to them.
 8 Because of BofA's conduct with respect to the building, however, two of the six units no longer
 9 exist much of remainder is essentially unrentable. BofA, having got its hands on the property
 10 years ago in a self-dealing transaction, and having operated the property at its whim for years
 11 with no regard to the Michelettis, now wants to wash its hands of the property and stick the
 12 Michelettis with the bill. The Michelettis are now faced with the return of a building that is
 13 worth far less than it would have been had BofA acted appropriately.

14

FIRST CAUSE OF ACTION
Breach of Fiduciary Duty
(Against All Defendants)

17 42. Plaintiff hereby incorporates by reference each and every allegation contained in
 18 paragraphs 1 through 41, as though fully set forth herein.

19 43. BofA, and Defendant Larry Johnston as Vice President and trust officer, owed
 20 Plaintiff fiduciary duties of loyalty and due care both during the Trust and after its nominal
 21 termination. BofA also owed this duty to the Arthur and Janice Micheletti Inter Vivos Trust and
 22 the Micheletti Family Partnership as the successors in interest to Plaintiff Art Micheletti's
 23 interest.

24 44. Defendants breached this duty of loyalty, inter alia, by (1) entering into the self-
 25 dealing lease described herein, which allowed it to do whatever it wanted with the property, (2)
 26 profiting at the expense of the trust beneficiaries by paying below market rent to the Trust while
 27 occupying a large portion of the building for itself and subleasing the rest, and (3) causing
 28 damage to the building by operating it solely for its own benefit.

1 45. BofA further breached its duty of due care by failing to manage the B Street
2 Property as a reasonably prudent person would have in the exercise of its own affairs.

3 46. As a Vice President and trust officer, Defendant Johnston personally participated
4 in these breaches, inter alia, by negotiating the lease with counterparts at BofA and obtaining
5 approval of it, all to the detriment of Plaintiff.

6 47. As a direct and proximate result of these breaches, Plaintiff has suffered damages
7 in an amount according to proof.

8 48. Defendants' conduct was wanton, malicious, and oppressive, justifying an award
9 of punitive damages.

**SECOND CAUSE OF ACTION
IMPOSITION OF CONSTRUCTIVE TRUST AND ACCOUNTING
(Against BofA and Does 1-5)**

3 49. Plaintiff hereby incorporates by reference each and every allegation contained in
paragraphs 1 through 48, as though fully set forth herein.

50. By entering into the self-dealing lease, BofA allowed itself the opportunity to profit from paying the trust a below-market rent. In breach of its fiduciary obligations, BofA would pay the trust a below-market rent, yet occupy part of the building for itself and sub-let the rest of the building, allowing BofA the opportunity to profit by the below-market rent arrangement. Such profit rightfully belongs to Plaintiff.

51. BofA intentionally concealed from Plaintiff that the rent paid under the agreement was below-market rent.

52. BofA in fact profited from the below-market rent arrangement, in violation of its fiduciary obligation to Plaintiff.

53. By virtue of the above wrongful acts, BofA holds its profits from the below-market rent arrangement in constructive trust for the benefit of Plaintiff.

54. BofA has not disclosed to Plaintiff the amount by which it profited from the below-market rent arrangement. An accounting is therefore necessary to determine this amount

THIRD CAUSE OF ACTION
Waste
(Against BofA and Does 1-5)

55. Plaintiff hereby incorporates by reference each and every allegation contained in paragraphs 1 through 54, as though fully set forth herein.

56. Beginning with the termination of the trust, BofA began to lease the B Street Property from the Plaintiff.

57. BofA had possession of the B Street Property at that time and has remained in possession every since.

58. Commencing at some point unknown, and continuing to the present day, BofA has caused injury to the premises by committing waste thereon by the acts described above. When BofA announced it would not renew the lease and subsequently vacated the premises, Plaintiff was damaged.

59. Before the commencement of BofA's conduct, the B Street Property consisted of six rentable units. It now consists of three units with a vastly diminished value. As a direct and proximate result of BofA's conduct, Plaintiff has suffered damages in an amount according to proof.

60. Each act and omission of Defendant as alleged above was done intentionally and intentionally concealed from Plaintiff. Defendant willfully and maliciously engaged in this conduct with the full knowledge that it would result in substantial damage to the premises and Plaintiff's interest in the premises. Therefore, Plaintiff is entitled to recover treble damages from BofA.

FOURTH CAUSE OF ACTION
Constructive Fraud
(Against All Defendants)

61. Plaintiff hereby incorporates by reference each and every allegation contained in paragraphs 1 through 60, as though fully set forth herein.

62. BofA was the trustee of the Trust at the time the lease was entered into. Further, BofA remained in a fiduciary position with respect to the B Street Property after the nominal

1 termination of the Trust. As such, BofA was in a fiduciary relationship with respect to the
2 beneficiary, Plaintiff, and the Assignors as successors in interest to Art Micheletti.

3 63. Defendant Johnston, as a Vice President and Trust Officer, likewise owed
4 Plaintiff a fiduciary duty.

5 64. Despite being in this position, BofA gained an advantage at the expense of the
6 beneficiaries of the Trust by entering into the below-market rent arrangement, and continued to
7 profit from this arrangement during the term of the lease. Defendant Johnston participated in this
8 breach. Despite their fiduciary obligations, Defendants failed to disclose at any time that it was
9 in fact profiting from the below-market rent arrangement.

10 65. Defendants did the acts herein alleged with the intent to deceive and defraud
11 Plaintiff, and concealed from Plaintiff the true market rental value of the property.

12 66. Plaintiff in fact placed confidence and reliance in Defendants until on or about
13 mid-2007, when BofA began preparing to demise the property, when Plaintiff discovered that in
14 fact BofA had been profiting from the below market rental arrangement for years.

FIFTH CAUSE OF ACTION

Negligence

(Against BofA and Does 4-10)

18 67. Plaintiff hereby incorporates by reference each and every allegation contained in
19 paragraphs 1 through 66, as though fully set forth herein.

20 68. BofA managed the property for Plaintiff and Assignors. It therefore owed a duty
21 of due care to them.

69. BofA failed to exercise due care in its management of the B Street Property.

23 70. As a direct and proximate result of BofA's failure to exercise due care, Plaintiff
24 and Assignors has been damaged in an amount to be proved at trial, including by the return of
25 the B Street Property in condition that is essentially unrentable.

71. BofA's conduct was wanton, malicious, and oppressive, warranting an award of
punitive damages.

SIXTH CAUSE OF ACTION
Conversion
(Against All Defendants)

72. Plaintiff hereby incorporates by reference each and every allegation contained in paragraphs 1 through 71, as though fully set forth herein.

73. BofA obtained the leasehold interest in the B Street Property by its own breach of fiduciary duty. It then converted the property to its own use for the next 30 years.

74. As the Vice President and Trust Officer, Defendant Johnston personally participated in wrongfully obtaining the B Street Property for BofA's own use.

75. As direct and result of BofA's unauthorized use of the B Street Property, Plaintiff was deprived of the use of the B Street Property, including the ability to lease it for market rent.

76. Defendant's conduct was wanton, malicious, and oppressive, warranting an award of punitive damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief against Defendants as follows:

1. For compensatory damages in an amount according to proof;
 2. For a declaration that BofA holds profits it made by the below-market rent-arrangement in constructive trust for Plaintiff;
 3. For an accounting;
 4. For pre-judgment interest;
 5. For costs of suit;
 6. For punitive damages.

DATED: July 16, 2008

KERR & WAGSTAFFE LLP

By

ADRIAN J. SAWYER

Attorneys for Plaintiff
ART MICHELETTI

JURY DEMAND

Plaintiff demands a trial by jury.

DATED: July 16, 2008

KERR & WAGSTAFFE LLP

BV

ADRIAN J. SAWYER

—

Attorneys for Plaintiff
ART MICHELETTI

NOTICE TO PLAINTIFF

A Case Management Conference is set for

DATE: 12-19-2005

TIME: 9:00 AM

PLACE: Department 212
400 McAllister Street
San Francisco, CA 94102-3680

All parties must appear and comply with Local Rule 3.

CRC 3.725 requires the filing and service of a case management statement form CM-110 no later than 15 days before the case management conference.

However, it would facilitate the issuance of a case management order **without an appearance** at the case management conference if the case management statement is filed, served and lodged in Department 212 twenty-five (25) days before the case management

Plaintiff must serve a copy of this notice upon each party to this action with the summons and complaint. Proof of service subsequently filed with this court shall so state.

ALTERNATIVE DISPUTE RESOLUTION POLICY REQUIREMENTS

IT IS THE POLICY OF THE SUPERIOR COURT THAT EVERY CIVIL CASE PARTICIPATE IN EITHER MEDIATION, JUDICIAL OR NON-JUDICIAL ARBITRATION, THE EARLY SETTLEMENT PROGRAM OR SOME SUITABLE FORM OF ALTERNATIVE DISPUTE RESOLUTION PRIOR TO A MANDATORY SETTLEMENT CONFERENCE OR TRIAL.
(SEE LOCAL RULE 4)

Plaintiff must serve a copy of the Alternative Dispute Resolution Information Package on each defendant along with the complaint. All counsel must discuss ADR with clients and opposing counsel and provide clients with a copy of the Alternative Dispute Resolution Information Package prior to filing the Case Management Statement.

[DEFENDANTS: Attending the Case Management Conference does not take the place of filing a written response to the complaint. You must file a written response with the court within the time limit required by law. See Summons.]

Superior Court Alternative Dispute Resolution Coordinator
400 McAllister Street, Room 103
San Francisco, CA 94102
(415) 551-3876

See Local Rules 3.6, 6.0 C and 10 D re stipulation to commissioners acting as temporary judges

1 BUCHALTER NEMER
 2 A Professional Corporation
 3 JAMES B. WRIGHT (#63241)
 4 RICHARD C. DARWIN (#161245)
 5 333 Market Street, 25th Floor
 6 San Francisco, CA 94105-2126
 7 Telephone: (415) 227-0900
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 9
 Attorneys for Defendants
 10 BANK OF AMERICA N.A. and LARRY JOHNSTON

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

11 ART MICHELETTI, an individual,)	CASE NO. CGC-08-477590
12 Plaintiff,)	NOTICE TO STATE COURT AND
13 vs.)	ADVERSE PARTIES OF REMOVAL OF
14 BANK OF AMERICA, N.A., a national)	CIVIL ACTION TO THE UNITED
15 banking association, LARRY JOHNSTON,)	STATES DISTRICT COURT UNDER
an individual, and DOES 1-10,)	DIVERSITY JURISDICTION, 28 U.S.C.
Defendants.)	§1441(B)

TO THE CLERK OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO, AND ALL PARTIES OF RECORD:

PLEASE TAKE NOTICE that Bank of America and Larry Johnston, defendants in the above-entitled action, have filed a Notice of Removal with the Clerk of the United States District Court for the Northern District of California, a true and correct copy of which is attached hereto as **Exhibit “1.”**

DATED: July __, 2008

BUCHALTER NEMER
 A Professional Corporation

By _____
 Richard C. Darwin
 Attorneys for Defendants BANK OF
 AMERICA N.A. and LARRY
 JOHNSTON

Exhibit D

Darwin, Richard C.

From: Darwin, Richard C.
Sent: Friday, July 25, 2008 10:59 AM
To: 'sawyer@kerrwagstaffe.com'; 'James M. Wagstaffe'
Cc: Wright, James; Skaggs, Frances
Subject: Removal and Related Case Motion

Gentlemen:

On Thursday, July 24, 2008, Bank of America removed the action recently filed by your client in San Francisco Superior Court, *Micheletti v. Bank of America, N.A. and Larry Johnston*, to the United States District Court for the Northern District of California. A copy of the Notice of Removal was served on you by mail, so I imagine that you will receive it today. The case has been assigned to Magistrate Judge Bernie Zimmerman, and has been assigned the case number CV 08-3557 BZ.

Within the next day or two, we intend to file an administrative motion to consider whether the newly removed action should be related to Bank of America's Petition to Compel Arbitration, which is currently pending before Judge White (Case No. CV 08-2902 JSW), pursuant to Civil Local Rule 3-12. The purpose of this email is to seek a stipulation from you that the two cases are related under the criteria set forth in L.R. 3-12(a). As I'm sure you are aware, your stipulation that the two cases are related will not operate as any sort of concession regarding the merits of the cases or the jurisdiction of the federal court, and we will not attempt to make any such argument.

Given that the two cases quite clearly meet the criteria set forth in Local Rule 3-12(a), we hope that we can count on your stipulation in order to expedite the assignment of the newly removed case to Judge White. Please let me know whether you will so stipulate as soon as possible.

Best regards,

Rick Darwin

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EXHIBIT D